

Collaboration and Intention: Making the Collaborative Family Law Process Safe(r)

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PART I. UNDERSTANDING THE ROLE OF COERCION

A. Introduction

Most family law lawyers believe they understand domestic violence. Even though most lawyers come to the practice without having studied domestic violence, they view intimate partner abuse as but one component of some family law cases. Just as learning dependency exemptions may be taught in one or two class sessions in federal income tax class, domestic violence is similarly briefly studied in family law courses. However, unlike dependency exemptions, there are neither short cut methods for learning about intimate partner abuse nor topics on domestic violence that can be taught adequately in ninety minutes. Domestic violence is not a subset of family law, although the two can be intertwined. The study of abuse in an intimate partner relationship involves a distinct body of law that intersects with nearly all fields, including torts, criminal law, and property, as well as family law. Domestic violence law practice relies not only upon traditional lawyering skills, but on an understanding of the interpersonal dynamics at play when intimate partner abuse has occurred. While there are no textbooks devoted only to dependency exemptions, there are many addressing domestic violence.¹

Law schools fuel this problem. Law schools do not mandate student preparation on how to identify someone who may be abused. Worse, no law school requires domestic violence study as a pre- or co-requisite to family law, despite the fact that statistically at least one in four female family law clients would have experienced abuse.² Further, same sex partnerships involve abuse at almost the same rate as different sex partners³ and transgender women experience intimate partner abuse at

¹See, e.g., NANCY LEMON, DOMESTIC VIOLENCE LAW (4th ed. 2013). See also KELLY WEISBERG, DOMESTIC VIOLENCE: LEGAL AND SOCIAL REALITY (2012).

² U.S. DEP'T OF JUSTICE, FULL REPORT OF THE PREVALENCE, INCIDENCE, AND CONSEQUENCES OF VIOLENCE AGAINST WOMEN, (2000), <https://www.ncjrs.gov/pdffiles1/nij/183781.pdf>.

³ Mary Beth D. Collins, Comment, *Same-Sex Domestic Violence: Addressing the Issues for the Proper Protection of Victims*, 4 J.L. SOC'Y 99, 99 (2002) (The text reads: "For numerous reasons society has not recognized the occurrence of same-sex domestic violence. Regardless of whether or not society wishes to recognize same-sex domestic

an even higher rate than other intimate partners. Yet, law schools continue to send graduates out to practice inadequately prepared to handle one quarter of their family law cases, which directly involve domestic violence. In addition, graduates cannot identify an abusive relationship in non-family law cases, nor can they recognize when employees may need assistance due to intimate partner abuse. This is especially true for those entering the practice of family law at solo and small firms. There, family law can be a staple of practice, making an even more frightening environment for those lawyers who come to practice with no formal training in domestic violence. In fact, some practitioners identify too late that they have insufficient training in the field. Thus, many find themselves accepting family law cases in order to earn a living and continue to neglect those cases involving abuse.

Given their lack of adequate training, family law practitioners fail to recognize abuse dynamics. Consequently, they do not appreciate the dangers that any dissolution process, including alternative dispute resolution, can create for those who are at risk for being abused by a current or former intimate partner. Collaborative law,⁴ a popular form of alternative dispute resolution (ADR), can create risk for those who experienced intimate partner abuse. The process can increase risk for someone who has been the target of abuse because of the frequent contact with the abusive party and the focus on the needs of the family as a whole, without first prioritizing safety for the abused party. The lives of parties who experienced abuse are made more complicated because of their advocates' failure to appreciate the consequences of coercion and other forms of abuse. In my earlier article, *Collaboration and Coercion*,⁵ I addressed the risks created by the collaborative process and why the process is largely inappropriate for cases involving intimate partner abuse.⁶

violence, it occurs. The statistical frequency of same-sex domestic violence mirrors the occurrence of heterosexual battering.").

⁴ Collaborative law is a resolution process where lawyers represent a party through a negotiation process. Sometimes, additional members, such as financial advisors, are added to the collaborative team.

⁵ See generally Margaret B. Drew, *Collaboration and Coercion*, 24 HASTINGS WOMEN'S L. J. 79 (2013).

⁶ See *id.*

I recognize, however, that there will be occasions when engaging in the collaborative process is perceived by the at-risk partner as the safest or most beneficial avenue of resolving the legal issues that accompany dissolution of the intimate relationship.

This article addresses those instances when the collaborative process may be the preferred negotiation vehicle for the family law client who has been abused. The article also explores ways in which the collaborative attorney and other professionals⁷ can make an inherently unsafe process safer. The collaborative process cannot guarantee emotional or physical safety for those who have experienced abuse in the intimate relationship. However, the collaborative team can reduce the risk of harm by working cooperatively.⁸

Whether or not collaborative professionals are able to provide an emotionally and physically comfortable space for meaningful settlement discussions will depend in large part upon the sincere intention of the collaborative professionals to acknowledge the history of coercion in the relationship, as well as the professionals' understanding of the dynamics of abuse. Business interests must be secondary in the lawyer's motivation to assist at-risk clients and their partners in reaching a resolution that safeguards autonomy for the at-risk client.⁹ A willingness to maximize safety and minimize the opportunity for continued coercion is essential to successful resolution through the collaborative and other alternative dispute resolution (ADR) processes when intimate partner abuse has occurred.

Part of the difficulty for the untrained lawyer in recognizing abuse is the accepted language employed to describe abuse within intimate relationships. "Domestic violence" is the commonly accepted term in describing such cases, but the phrase is misleading, it focuses attention on one small aspect of abuse: physical violence. This article explores the concept more fully later, but for purposes of this article and for

⁷ Professionals, in addition to attorneys, often work with couples engaged in the collaborative process which is why sometimes the term "collaborative professional" or collaborative "team" may be used.

⁸ As addressed later, the lawyers may be joined by therapists, custody coaches, financial advisors, and other professionals engaged to assist the separating parties in reaching resolution.

⁹ There are many terms used to describe those who have experienced abuse; survivor and victim are just two. In this article, I will refer to the individual who experienced abuse as the "at-risk partner" or the "target."

collaborative practice, the term “coercive control” will most often be the nomenclature used. This term more accurately describes the many forms that abusive behavior can take.¹⁰

Collaboration and Coercion,¹¹ on which this article builds, introduces the reader to the dynamics of a coercive relationship and the misunderstanding of many who consider abuse to occur only in physical form.¹² This article discusses some specific forms of coercion that exemplify behaviors signaling enhanced danger for at-risk partners. Recognition of physical abuse as but one aspect of coercion suggests a more complete understanding of the complex tactics of abuse. The practitioner’s understanding of abuse must expand to incorporate coercion as an insidious and pervasive form of partner control. In addition, the practitioner must appreciate the consequences that ensue once coercion has been woven into the relationship’s fabric. Coercive control has been defined as a pattern of using fear, manipulation, and violence to restrict a person’s liberties and keep the victim under the perpetrator’s control.¹³ Studies show that non-physical forms of coercion often precede physical abuse.¹⁴

Coercive partners often seek a resolution scheme that will support their continued dominance over their intimate partner and avoid accountability to a powerful independent third party authority, such as a judge. The abusive partner’s insistence on using the collaborative (or other ADR) process can signal danger for the partner who considers rejecting the abusive partner’s recommendation. If so, the case may be more appropriate for the collaborative process, not because of any objective criteria, but because of safety demands. This information does not change the concern that the basic mechanics of the collaborative

¹⁰ Intimate partner abuse, family violence, coercive control, and domestic terrorism are but a few of the phrases used to describe one intimate partner’s acts of control and violence over the other partner.

¹¹ See generally Drew, *supra* note 5.

¹² *Id.* at 82.

¹³ Helen Cleak et al., *Screening Partner Violence Among Family Mediation Clients: Differentiating Types of Abuse*, J. INTERPERSONAL VIOLENCE 3 (2015) (citing P.G. Jaffe et al., *Custody Disputes Involving Allegations of Domestic Violence: Toward a Differentiated Approach to Parenting Plans*, FAMILY COURT REVIEW 46, 500–22 (2008); J.B. Kelly & M.P. Johnson, *Differentiation Among Types of Intimate Partner Violence: Research Update and Implications for Interventions*, FAMILY COURT REVIEW 46, 476–99 (2008)).

¹⁴ *Id.*

process may create their own risk for coerced partners. But when the abusive partner explicitly or implicitly conveys to the at-risk partner that s/he will be at higher risk if the collaborative process is not engaged, then safety must guide decision making, despite the process' inherent risks.

Underpinning the success of the collaborative process in cases involving abuse will be the collaborative team's ability to recognize and acknowledge the seriousness of coercion in a relationship as well as the various ways in which the coercion impacts all aspects of the negotiations and outcomes. This awareness provides an important opportunity for the lawyers to acknowledge the damage to the family that coercion has done without minimizing the specific acts of coercion, the ongoing harm, and the possibility of continued abuse.¹⁵ Once the collaborative professionals understand the dynamics of abuse they will be able to address safety while maximizing the opportunity for the clients to reach satisfactory resolution.

This article focuses on how lawyers can meet the unique needs of their clients who have experienced abuse by suggesting ways in which lawyers can be sensitized to identifying coercion. The author will explore specific methods for maximizing safety where the collaborative process presents the least dangerous or the most beneficial option, as decided by the at-risk partner.

B. Introduction to the Collaborative Process in Family Law Cases

Collaborative law is a form of ADR appropriate for a wide range of legal disputes, but is best known for its use in family law.¹⁶ While mediation occurs with a "neutral" who does not advocate for one party or the other,¹⁷ in the collaborative process, clients are each represented

¹⁵ For example, saying "abuse has been part of this relationship but we have every confidence that such behavior will not be part of this process" avoids the issue of whose behavior has been inappropriate. This sets the at-risk partner up for sharing responsibility if coercion continues. Possible responses and attendant risks will be addressed more fully later in this article.

¹⁶ Phyllis Rubenstein, *Collaborative Law: Effectively Resolving Conflict Without Going to Court*, 36 VT. B.J. & L. DIG. 40, 40 (2010).

¹⁷ J. Jeske, *Custody Mediation within the Context of Domestic Violence*, 31 HAMLINE J. PUB. L. & POL'Y 657, 658 (2010) ("Mediation in child custody determinations is popular,

by counsel. The process focuses on a comprehensive agreement that accommodates the needs of both parties as well as the children. Each party is assured of an advocate to assist in clarifying the client's goals, explaining legal consequences, and supporting the client in negotiations. Not every mediation model permits the presence of counsel during negotiations. Collaborative law seeks a non-adversarial resolution of disputes, and looks to accomplish not mere agreement on how to end a dispute, but to design a resolution that accounts for the needs of collateral players, such as children and other family members. Collaborative law looks to the best interests of the family not solely as a way of ending dispute, but as a way to ensure ongoing harmony through communication as the re-formed family moves forward. This ideal can be achieved when both parties (parents) are similarly motivated. "Collaborative practice promotes respect, places the needs of the children first and keeps control of the process with the spouses."¹⁸ Mediation may accomplish some of these goals, but most often mediation is looking for a satisfactory agreement to be reached between the parties while not necessarily prioritizing what is best for the family as a unit.

This process was developed by Minnesota Attorney Stuart Webb in the late 1980's.¹⁹ Approaching burnout in his litigation practice, Webb designed a simple process whereby divorcing couples could reach a settlement uniquely designed for them without engaging the litigation model.²⁰ The process requires the parties and their attorneys to commit to negotiations while agreeing not to enter into the civil court system, other than for final presentation of the parties' agreement. Webb's design expanded in the 1990's as others took up the practice. A significant change to Webb's model involves the incorporation of other disciplines. Psychologists and financial planners have joined with collaborative lawyers in creating a "team" model.²¹ Others, such as

partly due to the mediation principle of neutrality, which theoretically gives both parents an equal chance at a fair allocation of parenting time.").

¹⁸ Michael A. Mastracci, *How Collaborative Practice Benefits Children*, <http://www.mccordweb.com/pdfs/Collaborative-Law-Article.pdf>.

¹⁹ Lawrence R. Maxwell, Jr., *The Development of Collaborative Law*, 16 ALTERNATIVE RESOL. 3-4, 23 (2007).

²⁰ *Id.*

²¹ *Id.*

custody coaches, were incorporated into the process over time. This is why, in discussion of the collaborative approach, law is sometimes viewed as only one component of collaborative divorce. There are several additional elements that are required for the process to be considered collaborative.

Prior to engaging in the collaborative process, parties commit to an in-person negotiation where each party is represented by separate counsel. Negotiations are held over a number of meetings, until the dispute is resolved or until it is determined that the process will not be successful. By written contract (the participation agreement), disputing parties and their attorneys agree that should the negotiation process terminate before all issues are resolved, the attorneys who represent the parties during collaborative negotiations will not represent those same parties during any related, ensuing litigation. This is known as the “collaborative commitment.”²² One exception to this term is that the lawyers may represent their clients in litigation for certain emergency situations.²³ The non-litigation commitment accomplishes what many feel is the heart of the process: once the threat of litigation is removed from the negotiation process, parties are then motivated to eliminate posturing in favor of reaching a mutually satisfying resolution.²⁴ The significance of separating negotiations from the litigation process cannot be overstated. Shifting from a litigation model to one where the parties and lawyers continually focus on solutions that benefit both parties and the greater family can be difficult at first. Ultimately, the sole focus on negotiation frees the parties and lawyers from the inhibiting tensions of the adversarial process. After all, the process from which collaborative law is “alternative” is traditional litigation.

A primary foundational requirement in the collaborative approach is that the parties be transparent in their discussions and disclosures.²⁵

²² *Id.*

²³ Seeking an emergency protection order is one of the emergencies anticipated by the Uniform Collaborative Law Act.

²⁴ Yona Shamir, *Alternative Dispute Resolution Approaches and their Application*, UNESCO, http://webworld.unesco.org/water/wwap/pccp/cd/pdf/negotiation_mediation_facilitation/alternative_dispute_resolution_approaches.pdf.

²⁵ Sheila M. Gutterman, *Collaborative Family Law-Part II*, 30 COLO. LAW. 57, 58 (2001) (explaining that forthright disclosure is a fundamental tenet of collaborative practice).

Good faith is essential in accomplishing a fair and workable resolution.²⁶ Commentators agree²⁷ on the twin essentials of transparency and good faith.²⁸ For example, some commentators addressed the collaborative process from a structural perspective,²⁹ while at least one commentator addressed how domestic violence³⁰ concerns influenced the drafting of the Uniform Collaborative Law Act.³¹ No matter what commentators view as appropriate for the collaborative process, all agree that transparency and good faith are foundational.³² The twin pillars support and re-enforce trust between both parties as well as between the parties and their counsel. Parties' compliance with transparency and good faith ensures the integrity of the collaborative process. An important ingredient of the collaborative process is maintaining reasonable and respectful communication between the parties.³³ Respectful speaking and listening creates an environment where the parties are comfortable being transparent, which in turn encourages good faith in negotiations.

The collaborative process can be time consuming and expensive.³⁴ The process can be time consuming because so long as progress is being made, negotiations continue with ultimate resolution as the goal. The

²⁶ Drew, *supra* note 5, at 82.

²⁷ See generally UNIFORM COLLABORATIVE LAW ACT (2010), <http://www.uniformlaws.org/Act.aspx?title=Collaborative%20Law%20Act> (the Uniform Collaborative Law Act addresses what the lawyer should do if abuse in the clients' relationship is discovered); Nancy Ver Steegh, *The Uniform Collaborative Law Act and Intimate Partner Violence: A Roadmap for Collaborative (and Non-Collaborative) Lawyers*, 38 HOFSTRA L. REV. 699 (2009).

²⁸ Gutterman, *supra* note 25.

²⁹ John Lande, *The Promise and Perils of Collaborative Law*, DISP. RESOL. MAG., 29 (Fall 2005).

³⁰ See UNIFORM COLLABORATIVE LAW ACT, *supra* note 27 (unfortunately, when local practitioners proposed similar legislation in their own states, many of the provisions designed to protect targets of abuse were eliminated). See also OHIO REV. CODE ANN. § 3105.41–54 (LexisNexis 2013) (remarkably, however, the Michigan Supreme Court requires collaborative lawyers to screen for domestic violence); Deborah Bennett Berecz & Gail M. Towne, *The Uniform Collaborative Law Act, Michigan Not Left Behind*, 94 MICH. B. J. 40, 43 (2015).

³¹ See generally Ver Steegh, *supra* note 27.

³² See generally Gutterman, *supra* note 25.

³³ Rubenstein, *supra* note 16, at 41.

³⁴ See generally Joel M. Pratt, *Three Tiers for Collaborative Law: A Moderate Solution*, 5 RESOLVED J. ALTERNATIVE DISP. RESOL. 4 (2015).

process can be expensive because not only are the parties paying their lawyers, but often third party neutrals are brought into the process to provide information and guidance on particular issues. For example, a tax expert may be consulted to determine financial repercussions of a proposed property transfer. A financial expert may be consulted as to the best retirement or life insurance options for the family. Other experts, such as custody advisors or child therapists may be required depending upon the circumstances of the case. In addition, coaches for each party can be engaged to assist the parties with communication or other skills, and a case manager may be retained to keep everyone informed and on task. While costly, engaging third party professionals (who then become part of the “collaborative team”) can assist the parties in finding workable solutions. These third-party team members, like the lawyers, are invested in finding a successful conclusion to the process, typically defined by the parties reaching a workable agreement. Despite its financial and time commitments, a successful process can result in reduced hostility between the parties, a mutually satisfying agreement, and a template for effectively resolving future disagreements.

Alternative dispute resolution processes are promoted as superior methods of resolving conflict, particularly in family law cases.³⁵ Collaborative law in a non-abuse case can be a remarkably healing experience for the partners and children. Collaborative promoters emphasize the opportunity to reduce conflict between the parties and teach the parties how to work together. But none of these premises should be presumed applicable in cases involving coercive control. Abuse of an intimate partner is a learned, embedded behavior³⁶ that most often happens in private.³⁷ While an abusive partner may appear “cooperative” for a limited time in a particular setting, such as the collaborative one, the abusive behavior and the accompanying misogyny remains.³⁸ From this stems the challenges addressed below.

³⁵ See Elizabeth Kruse, Comment, *ADR, Technology, and New Court Rules—Family Law Trends for the Twenty-First Century*, 21 J. AM. ACAD. MATRIM. LAW. 207 (2008).

³⁶ Robin R. Runge, *The Evolution of a National Response to Violence Against Women*, 24 HASTINGS WOMEN’S L.J. 429, 452 (2013).

³⁷ Michelle Byers, Note, *What Are the Odds: Applying the Doctrine of Chances to Domestic-Violence Prosecution in Massachusetts*, 46 NEW ENG. L. REV. 551, 552 (2011).

³⁸ Megan G. Thompson, Comment, *Mandatory Mediation and Domestic Violence: Reformulating the Good-Faith Standard*, 86 OR. L. REV. 599, 618 (2007).

C. *Some Challenges with the Collaborative Model in Cases Involving Abuse*

The collaborative model creates challenges to the wellbeing of a partner who has been the target of abuse. Beyond the emotional and physical safety risks, the process can prevent the at-risk partner from achieving an equitable result and from creating a post-resolution environment where the at-risk partner's autonomy is restored.

In order to adequately address the needs of the at-risk partner, the primary focus must be on emotional, physical, mental and financial safety and the secondary goal should be achieving settlement. Until these needs are met, equitable resolution that enhances the ability of the abused partner and family to function independently will not be achieved.

For example, during any divorce process, respect by a coercive and abusive partner toward the at-risk partner is unlikely to be accomplished. While the ruse of appearing respectful may be sustained during the process, for someone who engages in the sort of coercion that can lead to physical abuse, change is not likely without long-term commitment and engagement in treatment.

Another process expectation is that the parties, as well as the professionals, will consider not only the client's individual needs, but also the best interests of the family as a unit.³⁹ This is problematic in multiple ways. Asking the partner who has experienced abuse to subordinate his or her safety to some greater family interest denies the reality of the at-risk party's experience and fails to recognize what s/he needs to live a coercion-free life. Without creating a safe result for the at-risk partner, the greater family good of reducing stress for both the children and the parents cannot be achieved.

Further, prior to introducing the parents to the collaborative process, team members often have predetermined that the greater interest of the family encompasses equal parental access to children and open communication between the parents. Frequent interaction between the abusive partner and the at-risk partner are incompatible with ensuring

³⁹ For a more detailed discussion of the collaborative process, see Luke Salava, *Collaborative Divorce: The Unexpectedly Underwhelming Advance of a Promising Solution in Marriage Dissolution*, 48 FAM. L.Q. 179 (2014); Drew, *supra* note 5.

the mental and emotional, if not physical, safety of the parent who has experienced abuse. In some cases, this is also true for the children. Contact, particularly frequent contact, can interfere with the at-risk parent's ability to heal from trauma caused by the abuse. These presumed interests of the family result in judges and other professionals minimizing the existence and consequences of coercion and other forms of abuse when fashioning remedies. This perspective incorrectly presumes that protection of the at-risk partner and the best interests of the family are incompatible. However, this is simply not the case.

D. *Understanding and Accepting the Essentials of Coercive Control*

1. *Identifying the At-risk Partners of Abuse in Intimate Relationships*

The first step in making collaborative law safer is to better the actors' understanding of the tactics of power and control at play.⁴⁰ In other words, assessing safety becomes possible once the professional understands these dynamics and what the literature and data reveal. Without appropriate training, however, partners in coercive relationships might be assessed as immature, even annoying. "Coercive control is one of the most difficult forms of violence for both perpetrators and victims to reveal, and for researchers to measure, yet assessment is critical to gain a full understanding of abusive patterns."⁴¹

Coercive relationships do not affect every group of individuals equally. In most instances, women are the primary victims of intimate

⁴⁰ The at-risk partner generally will be referred to as female with the abusive party referred to as male. Statistically, these are accurate designations. One study placed the number of male to female victims at 95% in heterosexual relationships. See Ellen Abbott, *Should I or Shouldn't I?: An ADR Provider's View of Referring Victims of Domestic Abuse to Mediation, Collaborative Law and Early Neutral Evaluation*, 16 FAM. L.F. 32, 39 (2008) (Cisgender women, transgender women, and women in lesbian relationships are the overwhelming targets of intimate partner abuse. Women who kill male intimate partners are most often killing their abusers. That is not the case for men who kill their current or intimate partners whether the targets are women or men. At risk men in same sex relationships, lesbians, transgender and cisgender women, and men abused by women will demonstrate the same range of at-risk partner behaviors described in this article and other articles.).

⁴¹ Cleak et al., *supra* note 13, at 3.

partner abuse.⁴² Transgender women are at even higher risk for violence.⁴³ Research conducted so far indicates that coercive and abusive behavior happens in same sex relationships at approximately the same rate as different sex relationships.⁴⁴ Domestic violence is rarely mutual.⁴⁵ Those who believe that mutual abuse is common, may hold that belief because they do not appreciate what they are observing when dealing with couples who experience intimate partner abuse. What may appear to be “mutual,” often reflects an at-risk partner’s attempts to find the most effective way to stop the abuse. Those efforts can include fighting back.⁴⁶ Unless one understands these various responses and strategies employed by at-risk partners seeking to be safe and independent, the experience of the at-risk partner cannot be fully appreciated. Moreover, an ability to understand the behaviors of those who abuse as well as those who are abused will serve collaborative professionals in assessing which partner in the relationship is the predominant abuser.⁴⁷

Because collaborative team members are committed to finding solutions that enhance the well-being of all family members, they must appreciate that children experience consequences when their mothers or fathers are abused.⁴⁸ Even if not physically abused themselves, children are keenly aware of the abuse. In some instances, the abused father or

⁴² See generally MICHELE C. BLACK ET AL., THE NATIONAL INTIMATE PARTNER AND SEXUAL VIOLENCE SURVEY: 2010 SUMMARY REPORT (2011), http://www.cdc.gov/violenceprevention/pdf/nisvs_executive_summary-a.pdf;

Isabelle Ouellet-Morin, et al., *Intimate Partner Violence and New-Onset Depression: A Longitudinal Study of Women's Childhood and Adult Histories of Abuse*, 32 DEPRESSION & ANXIETY 316 (2015).

⁴³ Leigh Goodmark, *Transgender People, Intimate Partner Abuse and the Legal System*, 48 HARV. C.R.C.L.L. REV. 51, 61 (2012).

⁴⁴ Collins, *supra* note 3, at 100.

⁴⁵ *Is Mutual Abuse Real?* DOMESTICSHELTERS.ORG (June 15, 2015), https://www.domesticshelters.org/domestic-violence-articles-information/is-mutual-abuse-real#.Vul4oObk_7w.

⁴⁶ See generally Leigh Goodmark, *When is a Battered Woman Not a Battered Women? When She Fights Back*, 20 YALE J. L. & FEMINISM 75 (2008).

⁴⁷ *Determining the Predominant Aggressor*, ADVOC. FOR HUM. RTS. (2010), http://www.stopvaw.org/determining_the_predominant_aggressor (police must understand the dynamics of domestic violence to identify the predominant aggressor).

⁴⁸ See generally R. Lundy Bancroft et al., *The Batterer as Parent: Addressing the Impact of Domestic Violence on Family Dynamics*, SAGE Series on Violence Against Women (2d ed. Sept. 14, 2011).

mother's capacity to care for the children may be diminished.⁴⁹ In others, bruises are visible. Because the majority of men who abuse women in intimate relationships were abused or witnessed abuse as children,⁵⁰ the man who abuses a child's mother has also likely done serious harm to her children. If the professionals believe it is in the best interest of the family to prevent the intergenerational transfer of abusive behavior, then terms protecting children from further exposure to abuse must be incorporated into the parties' agreement.

Additionally, stereotypes about the behavior of those people who have been abused can be a barrier to identifying at-risk partners. Meek, quivering, and grateful for assistance are stereotypical characteristics often associated with at-risk women. Some may have these characteristics but many do not. Abused women have had to survive living in extremely difficult situations, often while raising children. They have endured rages, destruction of property, threats toward themselves and children, loss of financial control, and loss of autonomy in decision-making, to describe just a portion of what those living with abusers experience. In order to survive, a woman may display counterintuitive behavior. She may work hard *not* to show fear in the presence of her abuser. Consequently, she may appear contentious, arrogant or aggressive. Ongoing contact with the abusive partner will likely exacerbate this behavior. Contact prevents the at-risk partner from creating an environment where she can heal without the constant mental and physical interference of the abusive partner. The same behavioral misconceptions can apply to children. Good school grades may be misleading to the professional who assesses whether or not children are affected by abuse. Focusing on schoolwork might provide an avenue of distraction as well as success. Children may behave politely, even lovingly, when in the presence of the abusive parent. To do otherwise could result in frightening consequences. When alone with the at-risk parent, the same children may be unruly and unfocused. When with the non-abusive parent, the children feel safe to act out the stress that accumulated while they were with the abusive parent.

The lawyer or other professional who proceeds in handling abuse matters without understanding the research and data on how abused

⁴⁹ *Id.*

⁵⁰ Lundy Bancroft, *The Parenting of Men Who Batter*, 36 COURT REV. 44 (2002), available at <http://www.bisecmi.org/aboutus/Bancroftarticle.pdf>.

parents and children are affected by the abuse, does a direct disservice to the client, whether that client is the partner who does harm or the at-risk partner.⁵¹

2. *Understanding Coercive Control in the “Domestic Violence” Framework*

Domestic violence⁵² is described in many different ways. The terms used to describe abuse, however, commonly referenced as one partner’s control of the other in ways that endanger the mental, physical, and emotional health of the at-risk partner while simultaneously extinguishing the at-risk partner’s autonomy and self-esteem.⁵³ For purposes of understanding the many forms that coercion takes, this article will most often reference “coercive control” rather than “domestic violence” since the latter phrase conjures images of physical abuse only.

Physical violence, or the threat of physical violence, is the implicit or explicit enforcement mechanism of abusers.⁵⁴ But, most abusers have other effective methods of controlling their at-risk partners. Those tactics often eliminate or reduce the need for physical abuse.⁵⁵ One hit or shove early in the relationship creates the understanding that the

⁵¹ Men who abuse are often in denial or simply unaware of the impact of their actions on children. Years ago, in Massachusetts, a billboard displayed a young girl with black eyes, with the caption “She has her mother’s eyes.” A hotline number was given. Most of the callers were men who abuse their children’s mother. Information received from Prof. Sarah Buel.

⁵² For a history of the term “domestic violence” and how it no longer serves us in the civil setting, see Drew, *supra* note 5, at 82. Domestic violence, intimate terrorism, relationship abuse, intimate partner abuse and coercive control may be terms used interchangeably in describing how one partner controls the other in ways that endanger the mental, physical, and emotional health of the at-risk partner while simultaneously extinguishing the target’s autonomy and diminishing her self-esteem. Civil advocates for those who experience abuse often prefer the terms coercive control and domestic terrorism. The combined terms convey the psychological pressure that is part of abuse as well as the sense of not knowing when the next strike will occur.

⁵³ The trauma suffered by battered women is comparable to that experienced by returning war veterans. See generally Judith Lewis Herman, *Trauma and Recovery*, BASIC BOOKS (1997).

⁵⁴ Herman, *supra* note 53; M.A. Dutton et al., *Coercion in Intimate Partner Violence, Toward a New Conceptualization*, 52 SEX ROLES 743, 748 (2005).

⁵⁵ See Dutton et al., *supra* note 54, at 750.

coercive partner can and will use physical control if she/he feels it is needed to accomplish the desired goal.⁵⁶ A target who decides to leave the relationship fifteen years after an incident of physical abuse and who, in the interim, has been controlled by non-physical coercive mechanisms can be in just as much danger than the partner who was hit yesterday.⁵⁷ Once the coercive partner assesses that the target seeks independence in any form, the control mechanisms employed will escalate, increasing the target's danger. "Thus it is dangerous for counsel to advise a client to simply leave without ensuring that a trained advocate or attorney has worked with her to conduct extensive safety planning."⁵⁸

Dr. Mary Ann Dutton of Georgetown University, Lisa Goodman of Boston College, and Evan Stark of Rutgers University are leading researchers on coercive control in the intimate partner context. Of significance to this discussion are two of their findings. The first is that physical violence is not necessarily the most common or most significant control tactic used in intimate partner relationships.⁵⁹ Secondly, psychological coercion can have significant impacts on the at-risk partner, in both the short and long term.⁶⁰

Abusive partners have a toolbox full of tactics, only one of which is physical abuse. The remaining tools are far more numerous and varied. The non-physical abuse tools are highly effective in accomplishing the goal of controlling the behavior of the at-risk partner.⁶¹ This control is accomplished when the at-risk partner either refrains from engaging in behavior s/he otherwise would, or engages in behavior s/he otherwise would not.⁶² Violence is simply a tool within

⁵⁶ See *id.* at 748.

⁵⁷ See *id.*

⁵⁸ See generally Sarah M. Buel, *Fifty Obstacles to Leaving, a.k.a., Why Abuse Victims Stay*, 28 CO. LAW. 10, 19 (1999); *Myths & Facts about Domestic Violence*, DOMESTIC VIOLENCE INTERVENTION PROGRAM (2017), <http://www.dvpiowa.org/myths-facts-about-domestic-violence/> ("Leaving a battering partner may be the most dangerous time in that relationship. Women are 70 times more likely to be killed in the two weeks after leaving than at any other time during the relationship.").

⁵⁹ Herman, *supra*, note 53, at 751.

⁶⁰ *Id.* at 752.

⁶¹ Dutton et al., *supra* note 54, at 743.

⁶² See STAT. tit. 19-A, § 4002 (1)(C) (1995) (where among the statutory definitions of abuse is the following: "Compelling a person by force, threat of force or intimidation to

this framework that the perpetrator uses to gain greater power in the relationship to deter or trigger specific behaviors, win arguments, or demonstrate dominance.⁶³

The abusing partner may need to employ physical abuse only rarely because other tactics prove successful in controlling the at-risk partner:

Physical violence may not be the most significant factor about most battering relationships. In all probability, the clinical profile revealed by battered women reflects the fact that they have been subjected to an *ongoing* strategy of intimidation, isolation, and control that extends to all areas of a woman's life, including sexuality; material necessities; relations with family, children, and friends; and work. Sporadic, even severe violence makes this strategy of control effective. But the unique profile of "the battered woman" arises as much from the deprivation of liberty implied by coercion and control as it does from violence-induced trauma.⁶⁴

The absence of overt physical violence can be a barrier for at-risk partners because coercion becomes apparent only when a pattern of behavior is observed.⁶⁵ Complications arise when we view domestic violence as one specific incident and do not place an event within the history and pattern of abuse. Abuse cannot be understood in isolation because control is accomplished through a series of behaviors designed to coerce the other partner:

For decades now, battered women's advocates have placed the notion of coercive control squarely at the center of their analysis of intimate partner violence

engage in conduct from which the person has a right or privilege to abstain or to abstain from conduct in which the person has a right to engage.").

⁶³ Dutton et al., *supra* note 54, at 743.

⁶⁴ Evan Stark, *Re-Presenting Woman Battering: From Battered Women Syndrome to Coercive Control*, 58 ALB. L. REV. 973, 986 (1995).

⁶⁵ See generally Evan Stark, *Prepared for Violence Against Women: Complex Realities and New Issues in a Changing World*, LES PRESSES DE L'UNIVERSITÉ DU QUÉBEC 7 (2012).

(IPV). Indeed, they have defined IPV as a “pattern of coercive control” in which the batterer asserts his power over the victim through the use of threats, as well as actual violence. Violence is simply a tool, within this framework, that the perpetrator uses to gain greater power in the relationship to deter or trigger specific behaviors, win arguments, or demonstrate dominance. Other tools might include isolation, intimidation, threats, withholding of necessary resources such as money or transportation, and abuse of the children, other relatives, or even pets.⁶⁶

While the collaborative practitioner may not initially appreciate the significance of the non-physical forms of abuse toward the at-risk partner, abused women report that physical forms of abuse cause more serious symptoms than physical abuse.⁶⁷ In the author’s more than thirty years of representing at-risk partners, sexual abuse aside, clients consistently report that they would rather endure more physical abuse than additional non-physical abuse such as rages and stalking. Other forms of non-physical abuse can range from loss of privacy; being mocked or otherwise diminished in front of the children; incessant following around the home; and humiliating the at-risk partner in front of family, friends, and strangers. Victims of domestic violence often identify non-physical abuse as a critical component of the battering dynamic. Indeed, some battered women have described psychological degradation and humiliation as the most painful abuse they have experienced. Manifestations of power and control in the battering relationship harm victims regardless of whether they are physical in nature.⁶⁸

A pattern of non-physical coercive control does not minimize the physical danger an at-risk partner faces from her abusive partner. One study by a leading lethality expert found that only 76% of women who were killed by their current or former intimate partner had a history of

⁶⁶ Dutton et al., *supra* note 54, at 743.

⁶⁷ K. Daniel O’Leary, *Psychological Abuse: A Variable Deserving Critical Attention in Domestic Violence*, 14 VIOLENCE & VICTIMS 3, 13 (1999).

⁶⁸ Deborah Turkheimer, *Recognizing and Remediating the Harm of Battering: A Call to Criminalize Domestic Violence*, 94 J. CRIM. L. & CRIMINOLOGY 959, 968–69 (2004).

prior physical abuse.⁶⁹ This means nearly one-quarter of intimate partners killed by their abusers had no known prior history of physical abuse. At some point the non-physical forms of coercion are deemed insufficient by the abuser to control his at-risk partner and serious physical harm or homicide ensues.⁷⁰ Without understanding that non-physical coercion can also indicate high risk, the collaborative practitioner may disserve clients through her failure to recognize their danger.

3. *Understanding the At-Risk Client's Response to Coercive Control*

How the practitioner responds to an at-risk partner's disclosures will determine the potential level of trust that could develop. At first, the practitioner will find it easy to minimize the impact of coercive acts on the client. This typically results from one particular incident that may not seem important or serious. For example, a woman reports that recently her husband has been showing more interest in the children. He has visited their schools for unscheduled meetings with teachers. The father has also made contact with the children's doctors, inquiring as to appointment times so he can attend. In the twelve years that the couple has had children, the father rarely visited the children's doctors or teachers. The lawyer could minimize the client's concern by suggesting these disclosed details fail to indicate inappropriate behavior focusing on the father's "right" to access the providers. Such a response by a lawyer fails to acknowledge the significance of the client's disclosure. The lawyer must ensure that a further inquiry and assessment is conducted.

⁶⁹ Jacquelyn C. Campbell et al., *Risk Factors for Femicide in Abusive Relationships: Results from a Multisite Case Control Study*, 93 AM. J. PUB. HEALTH 1089, 1097 (1993), available at <http://www.ncbi.nlm.nih.gov/pmc/articles/PMC1447915/>.

⁷⁰ Brynn E. Sheehan, et al., *Intimate Partner Homicide New Insights for Understanding Lethality and Risks*, 21 VIOLENCE AGAINST WOMEN 269, 269 (2014) ("The data uncovered acute risk factors prior to the homicide, identified changes in the perpetrators' behavior and the perpetrators' perceived loss of control over the victim.").

For example, the lawyer could expand questioning to discuss what prompted this change in behavior and why it is of concern to the client.⁷¹ This inquiry could perhaps show that the abrupt change in behavior informs the client of the coercive partner's plan to seek custody of the children, despite his historical lack of involvement in their day-to-day routine.⁷² As such, the mother's fear that the abusive father is preparing to seek custody is not unfounded. As one woman reported, she interpreted her husband's intentions as, "I am going to get what matters to you most."⁷³ This behavior comports with what research has shown: children are but another tool available to the coercive partner and probably the most powerful one at that.⁷⁴

Fathers who abuse are often rewarded for their recent interest in the children. Courts and others interpret the change as indicative of how much the father wants to maintain a close relationship with the children following separation. Courts assume that separation or the discussion of separation has triggered an awakening in the father as to what he could do better as a parent.⁷⁵ Those sophisticated in coercive control interpret the behavior differently. They recognize that an abrupt change in parenting style when separation is suspected or has happened signals, not an increased concern for the children, but a manipulation of them.⁷⁶ The manipulation broadens as courts and other players in the dissolution are drawn in to the scheme. Ultimately, the abusive parent's behavior seeks to punish the mother for leaving.⁷⁷ This tactic often prompts

⁷¹ When puzzled by a client disclosure or when seeking to understand the significance of a client statement, the question "What does that mean to you?" usually elicits information that provides important context.

⁷² The phenomenon of fathers seeking custody when they showed no prior interest in parenting has been noted by abused mothers and their advocates as well as researchers. See generally Peter Jaffe et al., *Access Denied: The Barriers of Violence and Poverty for Abused Women and Their Children Seeking Justice and Community Services After Separation*, in A SUMMARY REPORT FOR THE ATKINSON FOUNDATION 36 (2002), http://www.lfcc.on.ca/access_denied_full.pdf.

⁷³ *Id.* at 38.

⁷⁴ Dutton et al., *supra* note 54, at 747–48.

⁷⁵ See generally Bancroft, *supra* note 50.

⁷⁶ See generally Emma Katz, *Domestic Violence, Children's Agency and Mother–Child Relationships: Towards a More Advanced Model*, 29 CHILD. & SOC'Y 69 (2015).

⁷⁷ *Abusive Fathers Are More Likely to Seek Sole Custody in Child Custody Battles*, AM. MOTHERS POL. PARTY (Aug. 11, 2010), <http://americanmotherspoliticalparty.org/ampp-article-library-family-court-custody->

reconciliation when an abused mother realizes that without her around to act as buffer and primary target, the children will be at risk for increased abuse. “Threatening to take children is common abuse tactic and women have often discussed the implications of seeking custody or child support and the threats and harassment that follow.”⁷⁸

If a practitioner fails to inquire why a particular behavior is troubling the mother, the practitioner might conclude that the mother is engaging in parental alienation when in reality she is expressing concern about the children’s risk of being abused by the father when he has unsupervised access to them.⁷⁹ Significantly, the mother’s concerns are motivated by her desire to protect the children, rather than a desire to undermine the abusive parent.⁸⁰ Cases involving coercion should not proceed to a parental alienation analysis. Research affirms the reality of the abused mother’s fears that the children will be at risk if the father has unrestricted access to them.⁸¹ “Findings support the proposition that males who have perpetrated IPV are at increased risk for poor child-rearing practices and potentially child abuse.”⁸² Abused mothers understand this.

In defining abuse in the custody context, the National Council of Juvenile and Family Court Judges has used the following:

abuse-dv/5-family-criminal-law-and-research-abuse-dv-child-custody/40-abusive-fathers-are-more-likely-to-seek-sole-custody-in-child-custody-battles.

⁷⁸ See generally S.L. Miller & N.L. Smolter, *Paper Abuse: When All Else Fails, Batterer’s Use Procedural Stalking*, 17 VIOLENCE AGAINST WOMEN 637 (2011).

⁷⁹ “Parental alienation” is a term that describes one parent’s attempts to undermine the relationship between the children and the other parent. While the term sounds neutral on its face, the application has a disparate impact on women. Partners who abuse claim alienation on the part of the mother as a way to discredit her allegations that the abusive partner poses a risk for the children.

⁸⁰ Joan S. Meier, *The Misuse of Parental Alienation Syndrome in Custody Suits*, in VIOLENCE AGAINST WOMEN IN FAMILIES AND RELATIONSHIPS: VOLUME TWO, THE FAMILY CONTEXT 147, 148–50 (Evan Stark & Eve S. Buzawa eds., 2009). See also Joan S. Meier, *Parental Alienation Syndrome and Parental Alienation: A Research Review*, VAWNET.ORG, Sept. 2013, at 1.

⁸¹ See e.g., Amy Wright Glenn, *Ordered to Live with an Abuser: How and Why American Family Courts Fail Children*, PHILLYVOICE (June 28, 2015), <http://www.phillyvoice.com/live-abuser-american-family-courts-fail-children/>; Troy Anderson, *Mom Termed ‘Parental Alienator’ Wins Rare Vindication in Courts*, LOS ANGELES DAILY NEWS (June 18, 2006), <http://www.dailynews.com/general-news/20060618/mom-termed-parental-alienator-wins-rare-vindication-in-courts>.

⁸² See generally Stark, *supra* note 65.

[A] pattern of assaultive and coercive behaviors that operate at a variety of levels—physical, psychological, emotional, financial or sexual—that one parent uses against the other parent. The pattern of behaviors is neither impulsive nor “out of control,” but is purposeful and instrumental in order to gain compliance or control.⁸³

In other words, the father who demands custody of children when historically the abused parent has been the primary caregiver, is intentionally disrupting the relationship between the children and the mother. Further, he is punishing the mother for behaving in ways he disapproves and he is using the children to do so.

4. *Recognizing Danger Signs*

Lawyers can place their at-risk clients at greater risk if the lawyers do not recognize the dangers that can accompany the decision to leave the abusive relationship.⁸⁴ The same concern must be considered at every step of lawyer-client decision-making, including the decision of which legal methods and strategies to employ.⁸⁵

⁸³ HON. JERRY J. BOWLES ET AL., A JUDICIAL GUIDE TO CHILD SAFETY IN CUSTODY CASES 8 (National Council of Juvenile and Family Court Judges ed., 2008) (footnote omitted) (quoting CLARE DALTON ET AL., NAVIGATING CUSTODY AND VISITATION EVALUATIONS IN CASES WITH DOMESTIC VIOLENCE: A JUDGE’S GUIDE 8 (2004, revised 2006)).

⁸⁴ See THE MISSOURI COALITION AGAINST DOMESTIC VIOLENCE, UNDERSTANDING THE NATURE AND DYNAMICS OF DOMESTIC VIOLENCE 8 (2012), http://www.ncdsv.org/images/MoCADSV_UnderstandingNatureDynamicsOfDV_revised5-2012.pdf.

⁸⁵ DANGER ASSESSMENT, <https://www.dangerassessment.org/about.aspx> (last visited Jan. 7, 2017).

There is an abundance of scholarly work,⁸⁶ remote conferences, CLEs, trainings, on-line tools,⁸⁷ and other ways in which one can become knowledgeable on the dynamics of coercive control. A good beginning is to contact a local domestic violence service provider, including shelters and legal service offices, to find out when the providers will next train on the dynamics of domestic violence.

As part of achieving competency in the field, one must understand the answer to the following question: why those who have experienced abuse remain in the abusive relationships.⁸⁸ Fear of further abuse upon leaving, lack of support and assistance in remaining independent, finances, children, and love for the abusive partner, are but a few of the reasons at-risk partners may reject physical separation.⁸⁹ Equally important is for practitioners to understand what is mythical on the topic of intimate partner abuse as well as the role that misogyny, whether soft or hard, plays in creating obstacles faced by at-risk partners seeking to leave their abuser.⁹⁰

The lawyer moves toward competency in understanding coercion when s/he appreciates the complexity of the at-risk partner's responses to abuse. What may appear to be illogical or abusive on the part of the at-risk partner may be nothing more than a common response to abuse or other trauma.⁹¹ Eventually the practitioner will develop an ability to distinguish who in the

⁸⁶ See generally American Bar Association, http://www.americanbar.org/groups/domestic_violence/publications.html (last visited Jan. 7, 2017) (the American Bar Association's Commission on Domestic and Sexual Violence holds frequent trainings on the fundamentals of domestic violence in the legal context).

⁸⁷ DANGER ASSESSMENT, *supra* note 85. POWER AND CONTROL, <http://www.powerandcontrolfilm.com/the-topics/academics/evan-stark/> (last visited Jan. 7, 2017). SPEAKOUTLOUD, <http://speakoutloud.net> (last visited Jan. 7, 2017).

⁸⁸ See generally Buel, *supra* note 58.

⁸⁹ *Id.*

⁹⁰ See generally Justine A. Dunlap, *Soft Misogyny: The Subtle Perversion of Domestic Violence "Reform,"* 46 SETON HALL L. REV. 775 (2016).

⁹¹ Margaret B. Drew, *Collaboration and Coercion: Domestic Violence Meets Collaborative Law*, 1 IRISH L.J. 27, 50 (2012) ("The target's counter-intuitive behavior may seem unusual or bizarre to the untrained practitioner. Yet the behavior may be effective safety planning for the target and her children."). See Jane K. Stoeber, *Transforming Domestic Violence Representation*, 101 KY. L.J. 483, 522 (2013) ("Any change the survivor makes is relational and, while the survivor can seek to end the violence, he or she is not ultimately able to control the abusive partner's behavior. Attorneys should be cautioned from feeling that the survivor's choice to bypass a particular option is somehow 'causing' the violence to continue.").

relationship is the predominate aggressor.⁹² Proficiency in understanding the dynamics of the relationship will contribute to the practitioner's ability to provide competent representation, whether a lawyer represents the at-risk partner or the one who creates the harm.⁹³ The dynamics of a coercive and abusive relationship are counter-intuitive. Understanding the dynamics will lead to enhanced representation of both parties and reduces the risk of professional malpractice.⁹⁴ There are many behaviors that may indicate higher than usual risk for the abused client. But, there are two behaviors noted below because often the significance of these behaviors is not appreciated by practitioners.⁹⁵

a. *Stalking in an Intimate Partner Relationship is a High-Risk Sign*

T.K. Logan from the University of Kentucky is known for her research into the process and effectiveness of civil protection orders. An exhaustive Logan-led study of at-risk partners who sought civil protection orders found that, "[r]esearch suggests that abusive partners who stalk are more violent than those who do not stalk."⁹⁶ In addition, "[s]talking was highly prevalent in cases of actual or attempted femicides."⁹⁷ The Logan-led study also found that, "[a]pproximately 90 percent of actual or attempted femicide victims who experienced a physical assault in the preceding year were also stalked by the violent partner."⁹⁸ Furthermore, "[s]tudies suggest that partner stalkers were

⁹² See *Determining the Predominant Aggressor*, ADVOC. FOR HUM. RTS. (2010), http://www.stopvaw.org/determining_the_predominant_aggressor.

⁹³ Margaret Drew, *Domestic Violence and Lawyer Malpractice: Are We Revictimizing Our Clients?* 39 *FAMILY L. Q.* 7, 21–25 (2005). See also MODEL RULES OF PROF'L CONDUCT r. 1.1 (AM. BAR ASS'N 1983).

⁹⁴ Drew, *supra* note 91. See generally John M. Burman, *Ethical and Legal Implications of Domestic Violence on Practicing Law*, in *THE IMPACT OF DOMESTIC VIOLENCE ON YOUR LEGAL PRACTICE, A LAWYER'S HANDBOOK* 8 (Margaret B. Drew et al. eds., 2nd ed. 2004).

⁹⁵ This article is no more than a brief introduction to the dynamics of abuse as well as the difficulties encountered by those who are at-risk by their intimate partners. Addressed are several barriers that nearly every abused partner encounters, particularly when s/he leaves or attempts to leave. The list is not exclusive by any means, but merely highlights some concerning behaviors that often go unrecognized as indicators of dangerousness.

⁹⁶ *Intimate Partner Stalking: Comparing Partners Who Do and Do Not Stalk*, NATIONAL INSTITUTE OF JUSTICE, <http://www.nij.gov/topics/crime/intimate-partner-violence/stalking/pages/stalkers-nonstalkers.aspx#note11> (last visited Jan. 7, 2017).

⁹⁷ *Id.*

⁹⁸ TK LOGAN, *RESEARCH ON PARTNER STALKING: PUTTING THE PIECES TOGETHER* 8 (2010),

more controlling and physically and sexually violent in the...relationship compared to abusers who do not stalk their victims.”⁹⁹ Additionally, “[p]artner stalkers are more persistent than non-partner stalkers.”¹⁰⁰

A current or prior history of stalking of or by a client should raise concerns. Stalking can take different forms. Stalkers may follow their at-risk partners or make their presence known in other ways, such as by sending flowers or letters. Stalkers might use private investigators, friends, or family members to track the activities and schedules of the at-risk partners.¹⁰¹ Electronics provide new tools for stalkers.¹⁰² Global positioning systems and tracking software, even drones, permit the stalker to know the activities and schedule of the at-risk partner.¹⁰³ Keystroke and other software permits abusive partners to intrude into the life of the estranged partner even when the parties no longer live together. Keeping track of car mileage,¹⁰⁴ frequent patrolling,¹⁰⁵ or calls to the at-risk partner’s school or workplace keep the abusive partner informed.¹⁰⁶ Information is what the stalker needs and demands.

The abusive party needs information regarding the behavior of the at-risk party in order to control the at-risk party. Coercion requires

<http://www.victimsofcrime.org/docs/Common%20Documents/Research%20on%20Partner%20Stalking%20Report.pdf>.

⁹⁹ *Id.*

¹⁰⁰ *Id.*

¹⁰¹ Stalking, U.S. DEPT. OF JUSTICE, <https://www.justice.gov/ovw/stalking> (“Obtaining personal information about the victim by accessing public records, using internet search services, hiring private investigators, going through the victim’s garbage, following the victim, contacting victim’s friends, family work, or neighbors, etc.”).

¹⁰² States are beginning to address electronic abuse. Many states have enacted so called “revenge porn” statutes in an effort to prosecute social media abuse. *See, e.g.*, MD. CODE ANN., § 3-809 (West 2014).

¹⁰³ *See generally* Justine A. Dunlap, *Intimate Terrorism and Technology: There’s an App for That*, 7 U. MASS. L. REV. 10 (2012).

¹⁰⁴ James Dunn, *Husband who put tracking device on his wife’s car because he thought she was having an affair is convicted of stalking*, DAILYMAIL.COM (Jan. 19, 2017), <http://www.dailymail.co.uk/news/article-4137304/Husband-tracked-wife-s-car-convicted-stalking.html>.

¹⁰⁵ BRIAN H SPITZBERG & WILLIAM R. CUPACH, *THE DARK SIDE OF RELATIONSHIP PURSUIT: FROM ATTRACTION TO OBSESSION AND STALKING* 83 (2004) (“Finally, drive-bys emerged as a category of surveillance in which pursuers drive by, typically a residence, to check up on the victim’s location or activity.”).

¹⁰⁶ *See id.* at. 37–38.

information and the need for information results in stalking.¹⁰⁷ The collaborative practitioner can become a tool of the stalker. Manipulating the practitioner to obtain personal information about the at-risk partner and her habits, such as the names and addresses of anyone the partner has dated since separation can place the at-risk partner in danger. Disclosing information on place of employment can be hazardous to some at-risk partners, often resulting in her dismissal from her job once the workplace stalking begins.¹⁰⁸ Often these requests are disguised as seeking information in the best interests of the children. How to manage these situations will be addressed in Part II. Practitioners must consider whether participating in the stalker client's information-seeking is undermining the effectiveness of collaborative negotiations and, at worst, heightening the at-risk partner's physical danger. In any event, the collaborative practitioner must be aware of potential personal liability that may attach if serious injury or death results when the lawyer obtains requested information that assists the stalker in locating or harassing the at-risk partner.¹⁰⁹ Consider whether the behavior rises to the level of criminal activity when the collaborative professional knowingly aids the client who is a known stalker and who injures the at-risk partner after receiving the identifying information through counsel.¹¹⁰ An additional ethical consideration in abuse cases is determining at what point the practitioner has a duty to warn the vulnerable party that s/he may be in danger.¹¹¹

¹⁰⁷ See generally Dutton et al., *supra* note 54.

¹⁰⁸ See e.g., Associated Press, *Fired because of her stalker, California teacher sues*, THE MERCURY NEWS (Sept. 4, 2013), <http://www.mercurynews.com/2013/09/04/fired-because-of-her-stalker-california-teacher-sues/>.

¹⁰⁹ Drew, *supra* note 91 at 15, 18. See generally Sarah Buel & Margaret Drew, *Do Ask and Do Tell, Rethinking the Lawyer's Duty to Warn in Domestic Violence Cases*, 75 UNIV. CIN. L. REV. 447 (2006). Also, this is why non-essential information need not be disclosed as part of the collaborative process.

¹¹⁰ MODEL RULES OF PROF'L CONDUCT r. 1.2(d) (AM. BAR ASS'N 2017). See generally Buel & Drew, *supra* note 109.

¹¹¹ See generally Buel & Drew, *supra* note 109.

b. *Leaving: Collaborative Professionals Meet At-Risk Partners at a Dangerous Time*

Advocates and scholars have long recognized the increased danger that at-risk partners take when leaving the abusive relationship and afterwards.¹¹² It has been found that, “[w]omen who are divorced or separated are at higher risk of assault than married women. The risk of assault is greatest when a woman leaves or threatens to leave an abusive relationship. Nonfatal violence often escalates once a battered woman attempts to end the relationship.”¹¹³ Fatal violence increases, as well. About 75 percent of women killed by a current or former intimate partner are killed at the point of leaving.¹¹⁴

Collaborative professionals meet parties who have experienced abuse at the point where those parties have been or are in the process of separating, which is one of their most dangerous times.¹¹⁵ Coercive control tactics may no longer be containing the at-risk partner’s behavior. The reasons why the at-risk partner may wish to leave at a particular point in time are complex.¹¹⁶ Often the at-risk partner believes that the next abusive incident will result in serious injury or death.¹¹⁷ Some at-risk partners leave when the abusive partner makes threats toward the children or physically abuses them. Perhaps the at-risk partner has had a financial change in circumstances that enhances

¹¹² Miller & Smolter, *supra* note 78 (“Research reveals that battered women are at higher risk of serious injury or death following the termination of a relationship.”).

¹¹³ *Felton v. Felton*, 679 N.E.2d 672, 676–77 (Ohio 1997) (citing Stark & Flitcraft, *Violence Among Intimates: An Epidemiological View*, in HANDBOOK OF FAMILY VIOLENCE 307–08 (Van Hasset et al. eds. 1987); Anne L. Ganley, *Domestic Violence: The What, Why and Who, as Relevant to Civil Court Cases*, in *Domestic Violence in Civil Court Cases: A National Model for Judicial Education*, in DOMESTIC VIOLENCE MANUAL FOR JUDGES 24 (2015)).

¹¹⁴ Janice Roehl et al., *Intimate Partner Violence Risk Assessment Validation Study*, Final Report 10 (May 2005) (unpublished report) (on file with the National Criminal Justice Reference Service).

¹¹⁵ See generally Rose Mary Reiz, “Everything Will Be Okay”: *The Tragic Murder of a Lapeer Family Law Attorney*, 93 MICH. B.J. 15 (2014).

¹¹⁶ See *Why Doesn’t She Leave?*, NEW CHOICES, INC., <http://newchoicesinc.org/educated/abuse/DV/whynotleave> (“Staying in or returning to an abusive relationship is a complex decision that may be a very rational survival mechanism.”).

¹¹⁷ *Id.* (“Eventually many of us reach a point where we no longer have hope for the relationship or our fear of being injured or killed becomes too great.”).

the at-risk partner's ability to leave. Whatever the origin of the at-risk partner's decision to leave, the point of separation triggers increased risk.¹¹⁸ When the partner realizes that the coercive tactics currently in use are no longer having the desired effect, tactics may escalate in ways that present more danger to the at-risk partner's physical and emotional safety.¹¹⁹

The heightened danger that occurs when the at-risk partner leaves the relationship can last for years.¹²⁰ In the time frame during which the collaborative professional meets his clients, it will not matter if the client has been separated for weeks or years. A divorce indicates finality and increases danger.¹²¹ Times of court hearing and property settlement are dangerous times, as well.¹²²

Even if the practitioner or her client believes the at-risk partner is not in danger of serious physical injury, the lawyer and other members of the team cannot underestimate the harm that emotional, verbal, and other non-physical forms of coercion that contact with the abusive partner can have on the at-risk partner. The likelihood of serious physical injury or death set the standard by which many measure safety. Yet, exposure to any of the coercive tactics used by a partner who abuses will have a serious detrimental impact on the at-risk client. The ongoing consequences of the abusive behavior should not be underestimated nor should the limits of the collaborative team's abilities.

The question most asked by collaborative practitioners in cases involving coercion is: "[H]ow can we overcome the power imbalance that exists in the negotiation process" when coercive control is part of the partner's relationship? In most cases, it is impossible to change the power imbalance

¹¹⁸ See generally Sarah M. Buel, *Fifty Obstacles to Leaving*, a.k.a., *Why Abuse Victims Stay*, 28 *The Colorado Lawyer* 19 (1999).

¹¹⁹ See generally Miller & Smolter, *supra* note 78.

¹²⁰ *Beware Family Court: What Victims and Advocates Should Know, Part II – Avoiding the Risks of Family Court*, WOMEN'S JUSTICE CENTER, http://justicewomen.com/help_family_law_2.html (last visited Jan. 7, 2017).

¹²¹ Victoria Law, *For Domestic Violence Survivors, Family Court Becomes Site of Continued Abuse*, TRUTHOUT (March 6, 2016), <http://www.truth-out.org/news/item/35101-for-domestic-violence-survivors-family-court-becomes-site-of-continued-abuse> ("Kate assumed that, once she filed for divorce, her nightmare would be over. She was wrong.").

¹²² *Beware Family Court: What Victims and Advocates Should Know, Part III – Tips for Handling a Family Court Case*, WOMEN'S JUSTICE CENTER, http://justicewomen.com/help_family_law_3.html (last visited Jan. 7, 2017).

between the parties.¹²³ In some instances, however, there may be techniques that can help contain the coercive partner's harmful behavior. For collaborative practitioners, whose focus is on using non-challenging language while acknowledging the validity of each client's position, confronting the controlling behavior may be inconsistent with their goals and training.¹²⁴ By contrast, the team member who understands the need to draw boundaries and who has the ability to do so should be the member designated as the spokesperson to address coercive tactics as they are identified during the process. The willingness to confront the abusive behavior in the moment can be one key to enhancing safety.

PART II. INTENTION, COMPETENCY, AND ETHICS IN REPRESENTING CLIENTS WHO HAVE EXPERIENCED ABUSIVE RELATIONSHIPS

A. *Understanding the Role of Intention in the Collaborative Experience*

The law incorporates elements of intention in statutes, case law, and codes.¹²⁵ Most commonly, we understand intention in the criminal and tort realms.¹²⁶ In criminal law, "intention is a concept intended to distinguish one 'degree' of crime from another."¹²⁷ Civil law has developed the cause of action of "intentional tort."¹²⁸ Often in the law, intentionality is aligned with motive.¹²⁹

¹²³ Scott H. Hughes, *Elizabeth's Story: Exploring Power Imbalances in Divorce Mediation*, 8 GEO. J. LEGAL ETHICS 553, 578 (1995) (in the context of divorce, however, there are various reasons why mediation is not advisable, especially where there exists an inequality of bargaining power between parties).

¹²⁴ Gutterman, *supra* note 25, at 57.

¹²⁵ A HANDBOOK OF CRIMINAL LAW TERMS 353 (Bryan A. Garner ed., 2000) (Defines intention as the state of mind accompanying an act, especially a forbidden act. While motive is the inducement to do some act, intent is the mental resolution or determination to do it.).

¹²⁶ For a general discussion on the various uses of the word "intention" in legal and literary contexts, see CRITICAL TERMS FOR LITERARY STUDY 135–46 (Frank Lentricchia & Thomas McLaughlin eds., 2nd ed. 1995).

¹²⁷ *Id.* at 135.

¹²⁸ *Intentional Tort*, BLACK'S LAW DICTIONARY (6th ed. 1990) (defining intentional tort as a "tort in which the actor is expressly or impliedly judged to have possessed intent or purpose to injure").

¹²⁹ *Motive*, BLACK'S LAW DICTIONARY (10th ed. 2014) (defining motive as "willful desire, that leads one to act").

The concept of intention is foundational to many spiritual and religious practices. For example, “actions are by intentions.”¹³⁰ Another example, “the end does not justify the means. Thus the condemnation of an innocent person cannot be justified as a legitimate means of saving the nation. On the other hand, an added bad intention (such as vainglory) makes an act evil that, in and of itself, can be good (such as almsgiving).”¹³¹ Additionally, “a good intention counts as a good deed, even if you are prevented from carrying it out.”¹³² According to The Buddha, “right intention [is] threefold: the intention of renunciation, the intention of good will, and the intention of harmlessness.”¹³³

By this juncture, the practitioner may have incorporated the spiritual concept of intention into representation. Intention envelops a purity of action that is often lacking in commercial and personal transactions. In an age of cultural narcissism,¹³⁴ approaching transactions without a personal agenda is difficult, even when we seek to rid our unconscious selves of personal gain motivation. Without the intention of protecting the at-risk partner from further coercion, and reducing the opportunities for the coercive partner to create more harm, the practitioner disserves both parties. The partners will be left in the same or worse states (both the abusive partner and at-risk partner) than when the process began.

In representing partners who have experienced abuse and who engage the collaborative process, the legal and spiritual understandings of intention merge. Tied to the pillar of good faith, right intention is demanded not only of the clients, but also of the lawyers who represent them. Practitioners representing either party to an abusive relationship must enter into the representation with the intention of not creating any further harm. Good faith demands that the practitioner examine his

¹³⁰ *The Intention is the Foundation of Every Action*, ISLAMWEB.NET ENGLISH (Mar. 26, 2015), <http://www.islamweb.net/emainpage/articles/156996/the-intention-is-the-foundation-of-every-action>.

¹³¹ *Catechism of the Catholic Church*, THE VATICAN, http://www.vatican.va/archive/ccc_css/archive/catechism/p3s1c1a4.htm (last visited Jan. 7, 2017).

¹³² EIN YAAKOV: THE ETHICAL AND INSPIRATIONAL TEACHINGS OF THE TALMUD 295 (Avraham Yaakov Finkel trans., 1999).

¹³³ Bhikkhu Bodhi, *The Noble Eightfold Path, Chapter III Right Intention*, VIPASSANĀ FELLOWSHIP, <http://www.vipassana.com/resources/8fp3.php> (last visited Jan. 7, 2017).

¹³⁴ Sam Vaknin, *The Cultural Narcissist: Lasch in an Age of Diminishing Expectations*, SAMVAK.TRIPOD.COM, <http://samvak.tripod.com/lasch.html> (last visited Jan. 7, 2017).

intentions in accepting the matter. Competent representation in cases where abuse has been present can be achieved only if accepted without attachment to the outcome of the process and disregarding the practitioners own financial motives. Financial motivation and determination that the parties reach settlement undermine effective settlement in cases involving abuse, leaving the abused partner at ongoing and often greater risk of harm.

Practitioners working with abused partners will want to assess their motivations at frequent junctures and assess whether the best interest of their clients is still being served. Both clients benefit when coercive tactics are eliminated. But in order for the lawyers to protect their clients from doing further harm or from experiencing further harm, the lawyers must have the sincere intention of prioritizing prevention of harm while creating safety for the at-risk partner.

In order for the collaborative process to be effective, team members likewise must be mindful that coercive behavior in the intimate partner setting is intentional, in both the spiritual and legal sense. Not only is coercive behavior deliberate, it will continue absent the implementation of clear boundaries. The practitioner must accept that a partner who causes harm is not acting “out of control.”¹³⁵ The partner abuses with the planned goal of controlling the behavior of the other partner. Minimizing offensive behavior and removing accountability from the process, disempowers the at-risk partner and will reinforce the power imbalance that exists between the parties. The lack of accountability involves the abusive partner and the mediator.¹³⁶ If the team members have the intention of protecting the at-risk partner, then the team must be willing to acknowledge the coercive behavior without minimizing either the behavior or the abusive partner’s intention to cause harm. This acknowledgement is the fair starting point for developing an exit strategy for the at-risk partner that will protect her from the abusive partner’s control. Should the abusive behavior continue, then professionals, in private consultation with the targeted partner, must take protective action, guided by safety demands.

¹³⁵ See BOWLES ET AL., *supra* note 83.

¹³⁶ Penelope R. Bryan, *Killing Us Softly, Divorce Mediation and the Politics of Power*, 40 BUFF. L. REV. 441, 513 (1992).

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Competent representation of either party in a case involving coercive control requires an acceptance of the dynamics discussed thus far as well as the consequences of coercion. If the practitioner disregards or minimizes the impact of coercion on the collaborative process, then the intention to serve competently is impaired. The practitioner should not be lulled into believing that the abusive partner has become “reasonable” because of the cooperative nature of the process.¹³⁷

B. *Ethical Duty to Ensure Informed Consent to Participation in the Collaborative Process*

Many collaborative lawyers are current or former family law litigators who found collaborative practice to be a comfortable transition from a contentious and enervating litigation practice. Collaborative practice permits the family law attorney to continue using the accumulated experience in the field, while eliminating the major stressors attendant to the adversarial system. This, in fact, was a motivating factor for Stuart Webb when he developed the collaborative practice.¹³⁸ Collaborative family law attorneys, particularly those just building their practices, may ignore or minimize information that indicates the collaborative process may not be the best resolution process for a particular category of client. In an effort to build a financially sound non-litigation practice, a balanced discussion of resolution options may be omitted from information provided to the client. Or, at other times, the information on alternatives is provided, but only by way of pointing out the disadvantages of using non-collaborative resolution methods. Informed consent, a concept woven throughout rules of professional conduct,¹³⁹ can be assured only if the client is aware of the available variety of options, and their risks and advantages when applied to the client’s situation. These include collaborative law, mediation, and contemporaneous litigation and negotiation.

¹³⁷ Worse yet, when the abusive party appears cooperative and charming, some then discredit the history reported by the at-risk partner believing that she has overreacted to the coercive partner’s behavior or has misinterpreted that behavior.

¹³⁸ See generally Maxwell, *supra* note 19.

¹³⁹ See, e.g., MODEL RULES OF PROFESSIONAL CONDUCT r. 1.6, 1.8 (AM. BAR ASS’N 1983).

Some collaborative literature assumes that family law litigation is never appropriate. “The least litigious alternative is always going to be better for families.”¹⁴⁰ The same author refers to family law attorneys as “gladiators.”¹⁴¹ The characterization is biased. While some litigators may disregard civility and over-litigate a case, most family law attorneys attempt to settle matters in tandem with litigation. Negotiation and litigation is often the most advantageous method of resolution in cases involving intimate partner abuse. The authority of the court is available to contain the behavior of the abusive partner if needed, while the avenue of resolution remains open. Many family court judges take a sincere interest in the well-being of those who appear before them, encouraging resolution at various stages of the litigation. There is no question that litigation can be expensive. But if money is the sole measure in determining the appropriate forum for a client, the intimate partner who has experienced abuse will be disadvantaged.

There is reason to be concerned that the business interests of the practitioner will obscure a fair assessment of whether a client is in a relationship involving abuse. The Uniform Collaborative Law Act includes cautions about admitting the abuse case into the collaborative process. The practitioner is cautioned to screen for abuse and discourage the collaborative process as an appropriate resolution process for abuse cases.¹⁴² But when the Uniform Act became the basis for state models, at least one state eliminated most of the Act’s language addressing domestic abuse including the cautions.¹⁴³ Practitioners feared that discouraging abuse cases from using the collaborative process would eliminate too large a pool of potential clients.

The literature suggests a general prohibition on accepting domestic violence cases into the collaborative divorce process. While some practitioners may accept the notion that cases of domestic abuse are not appropriate for the collaborative process,¹⁴⁴ the disqualification criteria

¹⁴⁰ Pauline H. Tesler, *Collaborative Family Law*, 4 PEPPERDINE RESOLUTION J 317 (2004) available at <http://digitalcommons.pepperdine.edu/drlj/vol4/iss3/2/>.

¹⁴¹ See *id.*

¹⁴² *Uniform Collaborative Law Rules and Uniform Collaborative Law Act*, Rule 15, 48 FAM. L. Q. 1, 133 (2014).

¹⁴³ OHIO REV. CODE ANN. § 3105.41–54 (LexisNexis 2013).

¹⁴⁴ John M. Lande & Forrest Steven Mosten, *Collaborative Lawyer’s Duty to Screen the Appropriateness of Collaborative Law and Obtain Clients’ Informed Consent to Use Collaborative Law*, 25 OHIO ST. J. ON DISP. RESOL. 347, 356 (2010).

employed by the practitioners is so narrow that most cases of coercive control are accepted. This happens, for example, when the sole screening criteria used is whether a civil protection order is in place. This approach is harmful to the at-risk partner but also reflects an unwillingness on the practitioners' part to be educated on abuse and coercion.

The intention of honoring protections for the at-risk partner must be a priority while providing mechanisms for the target to recover from past abuse and prevent future abuse. All of this must happen in conjunction with providing a fair explanation of available resolution processes. The client can make an informed decision only after a comprehensive explanation of risks and benefits of various options.¹⁴⁵ If the lawyer proceeds with integrity, and presents the client with a balanced explanation of options, informed consent can be achieved.¹⁴⁶ If the lawyer promotes collaborative law without a fair discussion of other options, she is not meeting her ethical obligation to fully inform the client of risks and benefits of all available options.

C. Duty to Screen

Competent representation demands adequate screening for abuse. Abuse of an intimate partner incorporates many tactics.¹⁴⁷ Screening for the coercive case is necessary before one can assess the appropriateness of any resolution process for particular parties.¹⁴⁸ The screening must

¹⁴⁵ S. Abney, *Moving Collaborative Law Beyond Family Disputes*, 38 J. LEGAL PROF. 277, 283 (2014).

¹⁴⁶ See generally S. Abney, et al., *Civil Collaborative Law is On the Move: But, It Needs Your Help*, 21 ALTERNATIVE RESOL. 5 (2012).

¹⁴⁷ Mary M. Lovik, *If My Spouse Ever Hit Me I'd Just Leave*, 90 MICH. B.J. 24, 24 (2011) ("Other common tactics include intimidation; emotional abuse; financial control; threatening children, other family members, or friends; stalking; harming pets or property; and blaming partners for the abuse. Some batterers harshly enforce strict household rules or closely monitor at-risk partners, restricting their access to telephones, computers, or other means of communication.").

¹⁴⁸ Peter Salem & Ann L. Milne, *Making Mediation Work in a Domestic Violence Case*, 17 FAM. ADVOC. 34, 36 (1995) ("Most mediation proponents agree that many cases involving domestic abuse are inappropriate for mediation; that screening is necessary to determine which cases are appropriate; that mediators must be well trained in the dynamics of domestic abuse; that participation in the mediation process must be safe, fair, and voluntary; and that victims of abuse should not be required to mediate.").

include a comprehensive review of the various tactics that abusive partners employ.¹⁴⁹ “The task of screening for domestic violence or emotional abuse is inherently difficult and requires specialized knowledge of the nature and dynamics of spousal abuse.”¹⁵⁰ Those who have experienced abuse may not disclose the abuse during the first interview. Careful questioning is needed to prompt discussion of coercion in the relationship. While at least one study showed that mediators are aware of domestic violence, empirical research reveals that mediators do not routinely screen for abuse.¹⁵¹ At a minimum, the practitioner can access an on-line guide to interviewing those who have experienced abuse, and in the same handbook find information on how to prepare your client who has experienced abuse for negotiations.¹⁵²

Family law attorneys largely fail to screen for abuse even when there is some indication that a case might involve coercion. Often practitioners do not pursue an abuse inquiry, waiting for the client to disclose. Yet frequently, clients will not disclose abuse without attorney prompts. Some clients may not recognize non-physical control as a form of abuse, or acknowledge its impact on the abused client or the family until discussion with a professional. Unless sensitive to the dynamics of control, the practitioner may not recognize coercive behavior as part of a pattern of abuse and miss the opportunity to competently assess the appropriateness of a case for the collaborative process as well as referring the client to appropriate services.

Competent interviewing of at-risk partners is a skill that can be learned. The collaborative lawyer can properly identify intimate partner abuse through appropriate questioning.¹⁵³ While at-risk partners may not disclose readily, second or third interviews may yield information on coercive control. The interviewer may need to ask questions that prompt disclosure on various

¹⁴⁹ The practitioner is a competent screener only after she understands the fundamentals of power and control.

¹⁵⁰ Wander Wiegers & Michaela Keet, *Collaborative Family Law and Gender Inequalities: Balancing Risks and Opportunities*, 46 OSGOOD HALL L.J. 733, 754 (2008).

¹⁵¹ *Id.*

¹⁵² Representing Domestic Violence Survivors Who Are Experiencing Trauma and Other Mental Health Challenges: A Handbook for Attorneys, <http://www.nationalcenterdvtraumamh.org/wp-content/uploads/2012/01/AttorneyHandbookMay282012.pdf>

¹⁵³ Nancy Ver Steegh, *Eight Reasons Why Attorneys Representing Parents in Child Protection Proceedings Should Use an Intimate Partner Violence Screening Protocol*, 40 WM. MITCHELL L. REV. 3, Article 8 (2014), <http://open.wmitchell.edu/wmlr/vol40/iss3/8>.

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coercive techniques in order to determine if a pattern of behavior exists. For example, the lawyer might inquire as to who controls finances in the family. Does either partner need the permission of the other partner to access financial resources? Is either partner required to account for spending to the other partner? Depending upon the answers, the interviewer may begin to detect a pattern of control. There are on-line tools to assist the practitioner, as well as articles written to assist with screening.¹⁵⁴ A good catch-all interview question is to ask the client if the partner ever did anything that made the client feel uncomfortable. This can be modified for more specific information such as “Has your partner ever done anything to the children that made you feel uncomfortable?” or “Has your partner ever done anything sexually that made you feel uncomfortable?”¹⁵⁵

The practitioner may hear disturbing information and will be most effective if she is non-judgmental in both her reaction as well as her questioning. The client is likely to stop disclosing information if there is any hint that the information is disturbing the listener.¹⁵⁶ Some interviewers new to the process may have difficulty believing the client’s revelations. Abuse can be subtle, dramatic, and anywhere in between. At-risk partners include the wealthy, the well-educated, and members of all professions and religions. The wealthiest of neighborhoods have abusive households, as do the poorest.¹⁵⁷ The forms of coercion may be subtler with wealthier partners, but the coercion happens none the less and the at-risk partners are in no less danger. Keep in mind that if one in four women report experiencing intimate partner abuse, then the collaborative practitioner is likely to encounter abusive relationships at the same rate.¹⁵⁸

¹⁵⁴ ABA Screening Tool, http://www.americanbar.org/groups/domestic_violence/publications.html; Burman, *supra* note 94.

¹⁵⁵ For more information see on line tools such as those offered by the ABA at <http://www.americanbar.org/content/dam/aba/migrated/domviol/screeningtoolcdv.authcheckdam.pdf>.

¹⁵⁶ NEW JERSEY DIVISION OF CRIMINAL JUSTICE, INTERVIEWING TECHNIQUES IN DOMESTIC VIOLENCE CASES 4–5 (2003), <http://www.nj.gov/oag/dcj/njpdresources/dom-violence/module-four-student.pdf> (includes a list of reasons domestic violence survivors might not cooperate in an interview).

¹⁵⁷ Michele Weldon, *Opinion: The Rich and Famous Are Not Immune to Domestic Abuse*, CNN.COM, June 18, 2013, <http://www.cnn.com/2013/06/17/living/opinion-lawson-alleged-abuse/>.

¹⁵⁸ See generally OFFICE OF JUSTICE PROGRAMS, FULL REPORT OF THE PREVALENCE, INCIDENCE, AND CONSEQUENCES OF VIOLENCE AGAINST WOMEN (2000), <https://www.ncjrs.gov/pdffiles1/nij/183781.pdf>.

The practitioner may resist detailed screening as time consuming and only address those issues to be “resolved” during negotiations. But abuse permeates every aspect of the family relationship. Without sufficient assessment of the extent or existence of coercion in an intimate relationship, appropriate settlement terms cannot be negotiated and the at-risk client’s safety and autonomy will not be enhanced.¹⁵⁹

After proper screening¹⁶⁰ for abuse, the practitioner must then assess what precautions might protect the at-risk partner from ongoing exposure to the abusive partner’s coercive tactics if the client insists on pursuing the process. Part III addresses affirmative steps that can be taken to enhance safety.

D. Professional Duty Not to Cause Harm to Clients and Duty to Third Parties

In considering the ethics of lawyering in cases involving coercion, failure to focus on harm prevention raises malpractice concerns. Inappropriate tactics that result in escalation of risk are not excused under the guise of zealous advocacy. Ignorance that a particular strategy would increase the at-risk partner’s danger will not save the practitioner from either liability or discipline. Professional obligations to be competent and obligations to third parties are implicated. For the attorney representing the abusive partner, escalating tensions between the parties places the client at risk of arrest. Escalation of coercive tactics may result in a protection order against the coercive client, with all of the consequences that accompany the order’s entry. For the at-risk client, damages that result from further traumatization might find compensation from the pocket of the practitioner.

PART III. MAKING THE PROCESS SAFER

If the coercive partner insists upon engaging in the collaborative process, the at-risk client will assess her level of danger should she refuse the process. No one can guarantee the safety of the at-risk client,

¹⁵⁹ See generally Meier, *supra* note 80.

¹⁶⁰ See generally Burman, *supra* note 94.

but steps can be taken to minimize risk and preserve the integrity of the negotiations as well as the dignity of at-risk parties.

A. Developing Skills Sufficient to Identify and Manage the Dynamics of Coercive Control

Just as law schools do not require domestic violence as part of training for family lawyers, schools of social work do not fare any better in requiring their graduates to understand the dynamics of abuse. However, practitioners of other disciplines, such as social workers and custody coaches, have an abundance of resources available to fill this educational gap.¹⁶¹ Despite the easy availability of resources,¹⁶² collaborative practitioners from all disciplines attempt to fit cases involving coercive control into a process designed for situations where abuse is not a factor.

Those in the legal system incorrectly assume that once intimate partner abuse is addressed, often with a civil protection order or through separation,¹⁶³ the parties can proceed with the normal course of case resolution. The chosen resolution method continues without appreciation of the ongoing influence of abuse in the parties' situation. A similar misunderstanding happens on the therapeutic side where the practitioner may encourage joint counseling, thereby providing the abuser opportunities to continue control and manipulation. Misinterpretation and minimization of abuser manipulation and at-risk partner responses to that manipulation fosters the continued abuse of the at-risk partner.¹⁶⁴

¹⁶¹ See generally AM. BAR ASS'N COMM'N DOMESTIC VIOLENCE, COMPREHENSIVE ISSUE SPOTTING: A TOOL FOR CIVIL ATTORNEYS REPRESENTING VICTIMS OF DOMESTIC & DATING VIOLENCE, SEXUAL ASSAULT & STALKING (2008), http://www.americanbar.org/content/dam/aba/administrative/domestic_violence1/20110419_aba_cdv_issue_spotting.authcheckdam.pdf (giving tips to attorneys who take on highly sensitive cases of abuse); AM. BAR ASS'N COMM'N DOMESTIC VIOLENCE, STANDARDS OF PRACTICE FOR LAWYERS REPRESENTING VICTIMS OF DOMESTIC VIOLENCE, SEXUAL ASSAULT & TALKING IN CIVIL PROTECTION ORDER CASES (2007), <http://www.americanbar.org/content/dam/aba/migrated/domviol/docs/StandardsofPracticeCommentary82407.authcheckdam.pdf> (outlining various guidelines attorneys should employ when representing a client with an abusive past).

¹⁶² See e.g., Bancroft et al., *supra* note 48, at 5; Burman, *supra* note 94, at 1–3; Stark, *supra* 64, at 985–86; Mary Ann Dutton, *Understanding Women's Responses to Domestic Violence: A Redefinition of Battered Woman Syndrome*, 21 HOFSTRA L. REV. 1191, 1203–15 (1993).

¹⁶³ Meier, *supra* note 80.

¹⁶⁴ See LUNDY BANCROFT, WHY DOES HE DO THAT: INSIDE THE MINDS OF ANGRY AND CONTROLLING MEN 490 (2002); Bancroft et al., *supra* note 48, at 184–85.

In order to achieve minimal competency in client representation in cases involving coercion, lawyers must recognize their limitations. In particular, the practitioner may not feel competent to screen or otherwise assess abuse. Or the practitioner may not feel competent to conduct safety planning with the client. There is no reason why the practitioner must take sole responsibility for assessing whether the client has experienced abuse or to what extent the client is safe. The collaborative lawyer need not screen or interview the client alone. A domestic violence expert may be retained to guide the collaborative lawyer through the assessment process. In particular, an expert could advise the lawyer on how to interview the client, or the expert could conduct the interviews until the attorney feels comfortable screening on her own. Just as family law attorneys hire experts to advise on tax, pension and other issues, they may also hire domestic violence experts to participate in the collaborative process. Whether one or both attorneys consult privately with separate experts or the expert advises the entire team, the expert will assist in analyzing the parties' behaviors factoring in any history of coercion. Also, the expert will help differentiate between coercive behavior and mere bad behavior outside of the realm of abuse. The expert will permit the process to proceed more quickly, shortcutting lengthy debate on whether the team is observing a continuation of coercion. For those practicing in remote areas or who retain an expert out of the region, communications can be accomplished remotely.

One ethical consideration from the at-risk client's perspective is whether there is sufficient availability of domestic violence experts in the area. If the collaborative lawyer is practicing in a small town that may have only one lawyer expert in intimate partner abuse, the collaborative lawyer must discuss with the client the consequences of conflicting out the most appropriate available litigation lawyer by engaging that lawyer as the team expert. Should negotiations be unsuccessful, the at-risk partner could be left without access to a lawyer competent to handle her case; if the collaborative agreement prevents all participating lawyers from representing the client in subsequent litigation.¹⁶⁵ This dilemma may be resolved by retaining a domestic violence legal expert who is not local to advise in the collaborative matter. This could be accomplished by way of remote consultation.

¹⁶⁵ Gutterman, *supra* note 25.

B. Prioritizing Safety

The professional participants must understand their responsibility to maximize the safety of the at-risk client prior to recommending the collaborative process.¹⁶⁶ The ethical dilemma of prioritizing the safety of the at-risk client as part of the obligation to competently represent one's client has not yet been addressed in the collaborative context.¹⁶⁷ But given the process' focus on the family's collective best interests, prioritizing safety for the at-risk client and the children enhances the opportunity for the family to re-structure in a less fearful, and more beneficial, environment.

The at-risk client may be engaging the process only because to not do so would be unsafe. At-risk partners are the best judge of their own risk.¹⁶⁸ Since at-risk partners often minimize their danger, when an at-risk client insists that she is unsafe if she refuses the collaborative process, the professional must carefully consider the client's wishes. The professionals must ensure that the process maximizes protection of the emotional, physical, and psychological health of the at-risk partner to the greatest extent possible.

Making the commitment to prioritize may at first blush appear to create ethical conflicts for the team, particularly for the abusive partner's counsel.¹⁶⁹ But, the commitment aligns with the collaborative principal of considering the best interests of the family.¹⁷⁰ If the team wishes both parties to engage in the negotiation process, then the at-risk partner must be alleviated of safety concerns as much as possible. Prioritizing safety for the at-risk partner contributes to the ethical representation of the abusive party. The more boundaries that are set around the coercive partner's behavior, the less likely a civil protection order or other action will be needed to enhance the safety of the at-risk client. Conversely, if obtaining a protection order prior to entering the process will provide a greater level of safety or comfort to the at-risk

¹⁶⁶ See AM. BAR ASS'N COMM'N DOMESTIC VIOLENCE, STANDARDS OF PRACTICE, *supra* note 161, at 24.

¹⁶⁷ For a discussion of potential Tarasoff obligations, see generally Buel & Drew, *supra* note 109 (discussing when an attorney may disclose client confidences).

¹⁶⁸ D. Alex Heckert & Edward W. Gondolf, *Predicting Abuse and Reassault Among Batterer Program Participants*, NAT. CRIM. JUST. REF. SERVICE (2004), <https://www.ncjrs.gov/pdffiles1/nij/grants/202997.pdf>.

¹⁶⁹ MODEL RULES OF PROFESSIONAL CONDUCT r. 1.1, 1.3 (AM. BAR ASS'N 1983).

¹⁷⁰ See Rachel B. Goldman & Rita S. Pollack, *Collaborative Family Law in Massachusetts Divorce Law Practice* (2014).

partner, then one needs to be obtained. The abusive partner may be less likely to engage in criminal activity directed toward the other partner if boundaries set by the court order and the collaborative team are respected, even if the abusive partner's cooperative behavior is temporary.

In assessing whether to accept the abuse case into the collaborative process, counsel for the at-risk partner must consider whether the client has had sufficient time and support to heal from the abuse and whether s/he fully understands the risks of engaging the collaborative process, even with structural safeguards in place. The emotional and physical safety risks of the process¹⁷¹ include whether the at-risk partner has access to sufficient resources. The attorney must help the client understand that the process may not be successful at creating an appropriate resolution or in positively influencing the abusive party's behavior.¹⁷² The at-risk partner must make an informed decision on whether she will have the emotional and financial resources to pursue litigation should the collaborative process fail.¹⁷³ What distinguishes intimate partner abuse lawyering from non-abusive family cases is the need to focus on safety. At each juncture, the at-risk client must be consulted as to whether the planned action increases her risk. For instance, if the client will be in greater danger if she seeks a portion of her partner's pension, then the lawyer and client must develop a plan on how to address the pension in a way that is least likely to inflame the other party. This may mean relinquishing all claims to the pension early in the process. That a client would relinquish claims to a valuable asset may be counterintuitive to most family law practitioners, but to domestic violence lawyers, the decision to forego an interest in an asset that is emotionally charged for the abusive at-risk partner may be good safety planning.

The collaborative lawyer is no doubt familiar with the client centered lawyering model. In the collaborative process, however, other members of the family are hovering around the edges of the model, insisting on being

¹⁷¹ See T.K. Logan & Robert Walker, *Separation as a Risk Factor for Victims of Intimate Partner Violence: Beyond Lethality and Injury*, 19 J. INTERPERSONAL VIOLENCE 1478, 1479 (2004) (noting that "the mental health effects of partner victimization can last for years after the violence has ended"). See also Peter G. Jaffe et al., *Custody Disputes Involving Allegations of Domestic Violence: Toward a Differentiated Approach to Parenting Plans*, 46 FAM. CT. REV. 500, 501-02 (2008) (noting that the intensity and lethality of domestic violence after the victim leaves the relationship).

¹⁷² See Pauline Quirion, *Why Attorneys Should Routinely Screen Clients for Domestic Violence*, 42 BOSTON B.J. 12, 27 (1998).

¹⁷³ See Tesler, *supra* note 140, at 331. Possible remedies for lack of resources by the target will be addressed in Section G of this Part.

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considered in any strategy decision. In the coercive control case, client-centeredness is a necessity. The client has important information on safety and she will know the conditions that will make her feel most secure.

As part of competent representation of at-risk clients, the lawyer and other team professionals are required to make the clients aware of the local safety resources. This can include contact information for safety planning advocates, abused partners' support groups, and shelter.¹⁷⁴

C. *Prioritizing the At-risk Partner's Autonomy*

The twin to enhancing safety in successfully navigating those who have experienced abuse through the collaborative process is a commitment to restore the harmed partner's autonomy. If the at-risk partner is to participate fully in the process, the independence and respect typically absent from the coercive relationship must be restored. Historically, the at-risk partner's will was subordinated to that of the abusive partner. In coercive relationships, at-risk partners are able to exercise independent judgment only with the permission of the coercive partner or in those areas of decision-making in which the abuser has no interest.

The challenge for the team will be to determine how to preserve the at-risk partner's autonomy when the other partner will be expecting to exercise his usual control. Team members, including the abusing partner's counsel, will need to agree on respectful but firm ways in which to ensure that the at-risk partner is neither intimidated into silence nor ignored. Counsel for the party who does harm will carry the burden of preparing their client for a process that requires conversation to be respectful in an atmosphere where everyone is heard.¹⁷⁵

Practitioners must avoid the trap of approaching the coercive relationship with any hint that the partners are mutually responsible for the abuse and its consequences. Ordinarily, collaborative professionals seek to avoid discussion of blame in an attempt to move the parties forward.¹⁷⁶ But the abused partner

¹⁷⁴ *Standards of Practice for Attorneys Representing Parents in Abuse and Neglect Cases*, AM. BAR ASS'N. http://www.americanbar.org/content/dam/aba/administrative/child_law/ParentStds.authcheckdam.pdf (last visited Aug. 8, 2015).

¹⁷⁵ See generally Goldman & Pollack, *supra* note 170.

¹⁷⁶ David Hoffman & Dawn Ash, *Building Bridges to Resolve Conflict and Overcome the Prisoner's Dilemma: The Vital Role of Professional Relationships in the Collaborative*

cannot move forward with any implication that somehow the parties are mutually responsible for the harm that has occurred.¹⁷⁷ To do so will only serve to empower the coercive partner and place the at-risk partner at higher risk. In order to proceed with the abuse case in the collaborative process, one commentator believes that the abuse must be acknowledged.¹⁷⁸ However, while acknowledgement must be made, doing so in the presence of the party who has abused can be dangerous. Acknowledgement in this context is not the same as acknowledgement as prelude to apology and forgiveness. Any demand that the abusive partner acknowledge his or her abusive behavior could result in further anger, so acknowledgment must occur only if the at-risk partner requires acknowledgment as a prelude to negotiations. They will assess whether making the acts of abuse public is something that could raise the danger.¹⁷⁹ What may be important to the at-risk partner is the team's acknowledgment of the abuse. The abused partner will need to know that the professionals believe them and that the professionals will make efforts to protect them from abuse during negotiations. As the final arbiter of safety, the at-risk partner can decide what level of disclosure may safely be made in the presence of the former partner, or if such discussion is necessary at all.

The collaborative team members' best approach in preserving autonomy may be determining how to preserve or restore the at-risk partner's autonomy without resorting to stereotypes that have developed in the language of victimology. The professional must clear their mind of behavioral expectations when working with the at-risk partner. There is no profile of someone who has been abused.¹⁸⁰ Expectations that the at-risk partner will be weak-willed, grateful for assistance, timid, or exhibit other stereotypical behavior must be scrubbed from collaborative thinking. At-risk partners must be seen as whole human beings, individuals without categorization or labeling. In discussing the at-risk partner's struggle for autonomy, Martha Mahoney described the burdens at-risk partners bear when forced to confront the culture's tendency to define at-risk partners only by their abuse experiences:

Law Process, 2010 J. DISP. RESOL. 271 (2010) <http://scholarship.law.missouri.edu/cgi/viewcontent.cgi?article=1602&context=jdr>.

¹⁷⁷ Sara Cobb, *The Domestication of Violence in Mediation*, 31 L. & SOC'Y REV. 397, 426 (1997).

¹⁷⁸ Lande & Mosten, *supra* note 144, at 363.

¹⁷⁹ See NEW JERSEY DIVISION OF CRIMINAL JUSTICE, *supra* note 156.

¹⁸⁰ NAT'L COUNCIL ON CHILD ABUSE & FAM. VIOLENCE, *Spouse/Partner Abuse Information, What About the Victim?* <http://www.nccafv.org/spouse.htm> (last visited Jan. 5, 2017).

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In our society, agency and victimization are each known by the absence of each other: you are an agent if you are not a victim and you are a victim if you are no way an agent. In this concept, agency does not mean acting for oneself under conditions of oppression; it means *being without oppression*, either having ended oppression or never having experienced it at all. This all-agent or all-victim dichotomy [is not] easy to escape or transform.¹⁸¹

When the professional meets the at-risk partner, the professional may bring cultural stereotypes of those who have experienced abuse. Viewing the at-risk client as needier than other clients, or as deficient in decision making abilities, will interfere, if not prevent, development of trust in the professional relationship. If the practitioner cannot move beyond viewing the client as victim, then the best practice will be to refer the client to different counsel.

Likewise, any attempt by the collaborative professional to convince the at-risk partner to agree to terms that are not acceptable to them not only risks undermining the attorney-client relationship, but also disrespects the client's autonomy. The lawyer best serves the client through guidance, not direction.

D. *Preparing the Parties for the Collaborative Process*

The at-risk partner may believe that the team of collaborative professionals will be sufficiently powerful to control, even help reform, the coercive partner. Most at-risk partners look for a "reasonable" solution that will end the abuse, not appreciating that most intimate partner abuse is learned behavior deeply engrained in the abusive partner's belief system.¹⁸²

At-risk partners may seek answers to the "why" of battering, thinking that if the source can be discovered the vehicle for change will become apparent. For example, at-risk partners and others often assume that substance abuse is the cause of the partner's behavior. Drug or alcohol use by the abusive partner may escalate the seriousness of

¹⁸¹ Martha R. Mahoney, *Victimization or Oppression? Women's Lives, Violence, and Agency*, in *THE PUBLIC NATURE OF PRIVATE VIOLENCE* 64 (Martha Albertson Fineman ed., 1994).

¹⁸² See generally David A. Wolfe & Peter G. Jaffe, *Emerging Strategies in the Prevention of Domestic Violence*, 9 *DOMESTIC VIOLENCE & CHILD* 133 (1999).

injuries,¹⁸³ but sobriety does not ensure the at-risk partner's safety.¹⁸⁴ The "why" of abusive behavior is a complex question, but most certainly the reason has little to do with the actions of the at-risk partner. The seeds of abusive behavior were planted long before the parties met.¹⁸⁵ Just as not every abuser has substance addictions, not everyone who is addicted is abusive. Once substance abuse is treated, treatment which aims to change the abuser's underlying belief systems regarding romantic partners, including entitlement, misogyny and the assignment of strict gender roles, may follow.¹⁸⁶ This treatment is a specialized process best left to the experts.¹⁸⁷ For clients and members of a collaborative team to believe that they can change this deeply engrained behavior through the collaborative process would be naïve.

The collaborative practitioner has an obligation to advise the at-risk client that there are limits to the power that the team possesses to change the behavior of the abusive party. The client should gently be told that the desired outcome of restoring harmony is improbable. At best, the team can seek to contain the coercive behavior and protect the at-risk partner's autonomy during the process. Recognition of the limits of the collaborative team's power to change the abusive behavior must be accompanied by an open discussion as to whether the process is going to be the most effective one to accomplish the client's goals if one goal is to stop the coercive behavior.

Even if the abusive partner is cordial and well-behaved during negotiations, past behavior indicates that the same attitudes he had toward the partner during the relationship will continue. The goal of the process will be to resolve outstanding issues in a way that keeps the at-risk partner as safe as possible. The practitioner can assure the at-risk partner that safety will be revisited before each new topic is raised to help the team decide how to approach sensitive topics in the least harmful way.

¹⁸³ See *id.*

¹⁸⁴ See *id.*

¹⁸⁵ Sandra Bloom M.D., *Reflections on the Desire for Revenge*, 2 J. EMOTIONAL ABUSE 4, 61–94 (2001) <http://www.nonviolenceandsocialjustice.org/Research-Literature/Sanctuary-Model-literature-and-works-by-Sandra-Bloom/Reflections-on-the-Desire-for-Revenge/75/> ("If we hope to understand why people act out violently towards themselves and others, we need to examine the roots of violence in childhood.").

¹⁸⁶ See generally Drew, *supra* note 5.

¹⁸⁷ See generally Drew, *supra* note 5. See e.g., Emerge of Cambridge, MA <http://www.emergedv.com/> (Emerge is the oldest batterer's education program in the country).

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The team must consult on how the members will handle inappropriate behavior as it arises. Sexist or abusive language or actions cannot be ignored or the team risks escalating the dangerous behavior as well as undermining the process. The at-risk partner and her lawyer will identify cues that the abusive partner's anger is escalating as well as cues that will inform the practitioner when the client feels unsafe. The at-risk client may have important information on how team members best can diffuse the partner's anger or help the at-risk partner recover a sense of safety.

E. *Structuring Meetings to Protect At-Risk Clients*

The decision of whether to hold in-person meetings is a serious one. Sometimes abused partners feel that they are strong enough to face their abuser in person. Although face-to-face engagement can be empowering under the right circumstances,¹⁸⁸ positive outcomes should not be presumed. Competent counsel, with the assistance of a domestic violence consultant, will discuss the possible benefits and risks presented by face-to-face meetings.

Face-to-face encounters can re-traumatize the at-risk partner, delaying their ability to address the adverse consequences of being abused. Also delayed is the at-risk partner's ability to heal, to articulate her needs and negotiate successfully. Time is the friend of those who need to heal. This is counter to the processes used in traditional marriage dissolution.¹⁸⁹ An emphasis on speedy settlement can also be problematic where one party demands prompt negotiation and the attorneys expect successful and timely results.

The collaborative preference for in-person discussions is effective for cases that do not involve coercion. Collaborative professionals believe that "[t]hose committed to working through their difficulties can arrive at settlements quickly in a face-to-face environment instead of a series of offers, counteroffers, and memorializations."¹⁹⁰ In coercive control cases, face-to-face meetings may undermine the process in a myriad of ways. The structure of collaborative lawyering, with its frequent meetings, and the involvement of

¹⁸⁸ Angela Coulter et al., *Where Are the Patients in Decision-Making About Their Own Care?*, in POLICY BRIEF: WHO EUROPEAN MINISTERIAL CONFERENCE ON HEALTH SYSTEMS 8 (June 2008)

<http://www.who.int/management/general/decisionmaking/WhereArePatientsinDecisionMaking.pdf> (Noting that supported face to face discussion is used in restorative justice. The restorative process provides comprehensive preparation and support for those who have been victimized. This preparation begins well in advance of the actual meeting.).

¹⁸⁹ For example, court time standards often focus on clearing dockets and can leave little room for recovery.

¹⁹⁰ Salava, *supra* note 39, at 187.

a cadre of professionals who may be untrained in the dynamics of intimate partner abuse, serves to embolden the coercive partner who already holds most of the power in the relationship. That partner enjoys the support of team members as they often give the appearance of cooperating. Sometimes the coercive partner is the only one who appears to cooperate while the at-risk partner may be viewed as uncooperative when they resist proposals or reacts adversely to the abusive partner's unfamiliar and seemingly reasonable demeanor. The at-risk partner then is blamed for frustrating the settlement process.¹⁹¹

The ability of the partner who has experienced abuse to successfully navigate in person negotiations might be limited. Tolerance levels will vary depending upon several factors. These include the length of time since the last interaction with the abuser, whether an abusive incident occurred or not. The amount of healing the at-risk partner has accomplished will be significant, as well. Commonly, the at-risk partner will believe that they have a higher tolerance for seeing the abusive partner than is realistic. Re-traumatization can be one consequence of an in-person meeting between the parties.

Some collaborative professionals insist that clients at least be in the same location but in different rooms, as occurs in shuttle mediation.¹⁹² Physical separation in the same building does not reduce the client's risk of further physical or emotional abuse. If stalking has been part of the coercive pattern, being in the same building provides the coercive partner with information on the abused partner's location. Perhaps more significantly, the most important ingredient in trauma healing can be the lack of direct contact with the abuser for a significant period of time. While communication in a controlled environment may go well initially, over time the exposure will cause the traumatized partner to revert to prior employed strategies in order to control what they believe is a dangerous situation. For example, the mere exposure to the abusive partner in the same room can be overwhelming, even if the at-risk partner insisted that they were ready for face-to-face meetings and were not afraid. In an attempt to control what the at-risk partner perceives as an unsafe situation, they may engage in previously successful strategies that will end the process quickly. These strategies may include engaging in direct negotiations

¹⁹¹ Joanne Fuller & Rose Mary Lyons, *Mediation Guidelines*, 33 WILLAMETTE L. REV. 905 (1997) (Stating mediators must remain aware of the limitations on their knowledge about the parties seeking mediation. It is easy to overlook or misread the signs of domestic violence and perceive the victim as the uncooperative party.).

¹⁹² FAMILY DISPUTE RESOLUTION, FDR IN CASES INVOLVING FAMILY VIOLENCE, AUSTRALIAN L. REFORM COMMISSION (2010) <https://www.alrc.gov.au/publications/21.%20Family%20Dispute%20Resolution/fdr-cases-involving-family-violence>.

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with the abusive partner, a practice that is prohibited in the collaborative process.

The best solution may be to meet by remote conferencing rather than conducting in person negotiations. Remote conferencing may assist the at-risk client in reaching a level of comfort that enables them to be more engaged and self-protective in negotiations. Remote conferencing permits face-to-face meetings while providing the at-risk partner with a layer of protection from the abused partner's emotional and physical threats. That detachment may permit the at-risk partner to be self-protective during negotiations to an extent that they otherwise could not. Certainly, coercive control may be exercised during remote conferencing. But the impact of the behavior on the at-risk partner can be reduced if they are not in the physical presence of the abusive partner. Should any threat be perceived, the at-risk partner will have time to plan the safest next steps while in a secure environment. The geographic and emotional distance that remote conferencing brings helps minimize the coercive party's ability to intimidate and control the at-risk partner and increases the likelihood that the partners will reach agreement.

The process of arranging remote negotiations will inform the team as to the abusive partner's commitment to collaborative resolution. If the coercive partner opposes remote negotiation, the team may conclude that the coercive partner may have engaged in the process only to maintain continued in-person access to the at-risk partner. At this point the team might reconsider whether the collaborative process is the best choice for the couple.

As remote conferencing proceeds, team members must be sensitive to any on-going manipulations by the abusive party. For example, the abusive party may suggest that because remote meetings have gone well, the parties and professionals should meet in person. This proposal is best rejected by the team and considered only if the at-risk partner makes this suggestion initially and independently. Even then, careful discussion as to possible ramifications must be had. If the process has worked well with remote conferencing, the team would be ill-advised to risk a breakdown of successful communication by changing to in-person meetings. Abusive partners can be relentless in achieving their goals. Seeming cooperation may be a tool to achieve the ultimate result of in-person contact because the intimacy of the setting will enhance the abusive partner's ability to control the behavior of the at-risk partner.

F. *When the At-Risk Client Has Been Granted a Civil Protection Order*

Only in rare circumstances should the collaborative practitioner accept a case with an active protection order between the parties. The collaborative team may consider obtaining releases and conducting searches of protection order records as a routine step before accepting cases into the process. Even a lapsed protection order would indicate an imbalance of power making the case generally unsuitable for the collaborative process. However, in situations where a protected party wishes to engage the collaborative process, particular concerns must be addressed. The first is to determine how information regarding the collaborative process was communicated to the protected party. If there has been direct or indirect communication from the restrained party despite the existence of a no-contact order, declining representation is the preferred decision due to the possibility the abusive partner coercively influenced the protected party to use the collaborative process. Negotiations under these circumstances are unlikely to be beneficial. Such cases are precisely the sort that should not proceed without the advice of a domestic violence expert.

In the relatively rare situation where the protected party independently initiates the collaborative process, remote negotiations should be the norm. However, before entering the collaborative process, the attorneys and parties must agree that the terms of the protection order are changed to permit direct communication. All may agree that the collaborative lawyers may represent the parties in court for the exclusive purpose of amending the “no contact” portion of the order. The attorneys must be cautious in drafting the amendment so that the exception to the “no-contact” provision is narrow. Suggested language is “the respondent (defendant) may communicate with the petitioner during the collaborative law meetings, whether those meetings are in person or remote, so long as the attorneys for the parties are both present during the communications.”

One of the dangers in amending the order is that the coercive partner may attempt to seize the opportunity to alter other provisions. They may interpret the at-risk partner’s willingness to make one amendment as openness to making additional changes. Counsel must reject any discussion of further modifications to the order and make clear that there will be no “trading” of protections in return for “favorable” agreement on terms that benefit the at-risk partner, such as child or spousal support. When the collaborative process has concluded, counsel for the abusive partner will need to be mindful of their client’s ongoing attempts to manipulate the process. For example, the client may request that the attorneys continue contact with the protected partner,

either though the delivery of ongoing messages or attempts to schedule unnecessary meetings. The attorneys need to recognize that the attempted manipulation by the coercive party may be an effort to maintain control over the at-risk partner.

G. *Protecting the Financial Autonomy of the At-risk Partner*

Several issues arise when the at-risk partner has limited access to resources. The first is their ability to support themselves and any children during the negotiation process. Even if the family has resources, coerced partners often do not have access to family finances.¹⁹³ The abusive partner may promise that they will begin paying support as soon as the at-risk partner agrees to use collaborative divorce. But abusers may need the authority of the family court to ensure compliance with support agreements. The collaborative contract used in abuse cases must permit the lawyers to represent the clients at temporary order hearings. Court orders are the only way to ensure that the at-risk partner has sufficient resources to proceed with the collaborative process. A court order ensures an enforcement mechanism that other processes, such as automatic bank withdrawal or escrow accounts, do not.

Clients may engage separate counsel for purposes of the temporary order stage of the court process, but that option is available only to those with adequate resources. Fortunately, most states permit the “unbundling” of legal services.¹⁹⁴ Sometimes this is called “limited representation.” Through unbundling, lawyers may file an appearance for a specific purpose and without the responsibilities that accompany a general appearance.¹⁹⁵ Counsel can appear on motions for temporary orders without making a commitment to represent a party in any subsequent actions. The existence of temporary orders can go a long way in leveling the bargaining power of the parties. Since the court may expect the divorce, once filed, to proceed at a predetermined pace, the parties should consider seeking the permission of the court to stay divorce proceedings while the collaborative process is engaged. Ordinarily this would entail a motion to stay or alter the court’s time standards. Once that request is granted, collaborative negotiations can proceed at a comfortable pace.

Importantly, the collaborative contract must provide a mechanism for the at-risk partner to access sufficient funds to retain counsel should collaborative

¹⁹³ *What is Domestic Violence?* ADVOCATES AGAINST FAM. VIOLENCE, <http://www.aafvhope.org/what-is-domestic-violence> (last visited Jan. 5, 2017).

¹⁹⁴ Forrest Mosten, *Unbundling Legal Services in 2014: Recommendations for the Court*, 53 JUDGES’ J. 10 (2014).

¹⁹⁵ Jessica K. Steinberg, *Demand Side Reform in the Poor People’s Court*, 47 CONN. L. REV. 741, 761 (2015).

negotiations end without resolution.¹⁹⁶ This set aside assures that the at-risk partner is in a position of negotiating strength. Otherwise, the at-risk partner may concede favorable terms in order to end the process and any attendant distress and expense. The dedicated funds must be sufficient to hire competent domestic violence litigation counsel. How this is accomplished will take thought. Any escrow account must have an agent. If the process concludes unsuccessfully, the abusive party may file court motions to block distribution of the funds to the at-risk partner. One suggestion is that a neutral attorney act as sole escrow agent and that the terms of the agreement express the neutral's ability to distribute funds promptly to the at-risk partner once collaborative negotiations end. The escrow agent must be shielded from liability and perhaps provided with additional separate funds for defending any resulting action. The neutral's defense funds can be returned to the marital asset pot if their use is unnecessary. Alternatively, funds could be distributed to the at-risk partner at the time that process begins. Since the party providing the funds may not trust the at-risk partner to fully cooperate with the collaborative process if they are already in possession of attorney's fees, the escrow option may not be agreed upon. But, should an escrow be established and negotiations succeed, the escrowed funds can be divided however the parties agree.

A caution is necessary here. Any escrowed funds are best kept intact until a hearing is held on the divorce and the agreement accepted by the court. The at-risk party must be protected from last minute attempts by the abusive partner to change terms of the parties' agreement. If the funds are distributed to the parties as part of the underlying agreement prior to court acceptance of the agreement, the at-risk partner may be disadvantaged and vulnerable to re-negotiation demands.

H. *Provisions Protecting the At-risk Partner are Not Adverse to the Best Interest of the Entire Family*

Some family court judges and lawyers consider the existence of an active protection order as preventing settlement that is in the best interest of the entire family.¹⁹⁷ This is a false assumption. The opposite is true. Protecting the at-risk partner from exposure to the abusive partner enhances the peaceful functioning of the family. Any predetermination that the parties must be able to communicate directly in order to achieve maximum functioning for the

¹⁹⁶ This fund has been referred to as a "bucket" set aside for the protection of the vulnerable partner.

¹⁹⁷ *Beware Family Court: What Victims and Advocates Should Know, Part IV- A Couple Tips on Restraining Orders*, WOMEN'S JUSTICE CENTER, available at http://justicewomen.com/help_family_law_4.html (last visited Jan. 5, 2017).

post-separation family is misguided.¹⁹⁸ Neither the at-risk parent nor the children should be expected to subordinate physical or emotional safety so that an “ideal” re-formed family can be organized. The at-risk partner will decide how much contact with the abusive partner they can tolerate. If a protection order requires no contact by the protected party, any resolution must honor that restriction. Negotiations must proceed by incorporating the terms of any protection order into resolution rather than expect the at-risk partner to concede protections. A ground rule explicitly removing modification of the protection order from negotiations must be included in the participation agreement. This does not mean that communication between the parties will not happen.

Some at-risk partners successfully manage limited monitored communication, through tools such as Family Wizard.¹⁹⁹ Others fear that once any portal to direct communication is opened, so is the pathway to further coercive tactics. The team can consider creative options for communication regarding the children. Any schedule of time spent with the abusive parent must be carefully detailed in the agreement, as should all provisions.²⁰⁰ Ambiguous or fluid terms give the abusive partner control over the at-risk partner by using the uncertainty created in the document as an excuse for direct communication or for contempt litigation. The need for precision provides the collaborative team with an opportunity to find tailored ways for the family to function despite the need to limit contact between the parents. If the team views the need to limit contact between the parents as anathema to collaborative divorce principles, the team should eliminate any case involving coercion from the collaborative resolution.

I. *Preparing the Party Who Has Caused Harm for the Collaborative Process*

Working with the abusive party can present challenges to the entire team and to the coercive party’s lawyer in particular. Just as there is no profile of

¹⁹⁸ Debra Everman & Audrey Numbers, *An Alternative to the Next Battle: Collaborative Law*, 52 ADVOCATE: OFFICIAL PUBLICATION IDAHO ST. B. 20 (stating one goal of collaborative law is to help couples “restructure” the family).

¹⁹⁹ Family Wizard is an on-line program that organizes parent communications. The program is designed to maximize communication while reducing opportunities for hostility or manipulation. See e.g., <https://www.ourfamilywizard.com/> (last visited Jan. 5, 2017).

²⁰⁰ *Standards of Practice for Attorneys Representing Parents in Abuse and Neglect Cases*, AM. BAR ASS’N http://www.americanbar.org/content/dam/aba/administrative/child_law/ParentStds.authcheckdam.pdf.

someone who is abused,²⁰¹ there is no profile of one who does harm.²⁰² Just as the attorney must screen for abuse in the client who is suspected to have been harmed, the lawyer for the party who caused that harm will serve both the client and the collaborative team. An extended conversation may be needed in order to determine whether the client has been abusive toward the partner and whether he can work within the collaborative process. A domestic violence expert can assist in making this determination.

Coercive control can be summarized as an individual's failure to respect boundaries in a way that causes harm to the intimate partner. The first step in dealing with someone who abuses intimate partners is to draw boundaries around any disrespectful behavior that occurs in the presence of the lawyer or other team member. For example, during an initial interview the husband refers to his wife as a "bitch." This comment provides the opportunity for the practitioner to respond with a demand that the prospective client not refer to any woman with the offensive word. The practitioner helps the client as well as the team by addressing the offensive language. This may be the first time the inappropriate language has been brought to the client's attention. The instruction can be particularly powerful if delivered by a man. Simultaneously the practitioner demonstrates a fundamental expectation of collaborative work, using respectful language.²⁰³

A client who cares about his image might make efforts to alter his tone and language, even if the change is temporary. If not, the practitioner may determine that collaborative law is not the appropriate vehicle for the case. Either way, the practitioner must acknowledge that a man who refers to women disrespectfully likely disrespects women in other ways. Look for whether gender roles are part of the client's belief system, another indicator of concern. This determination may not disqualify the case from the collaborative process, but will signal that if the team is not prepared to draw clear behavioral boundaries, the case must be declined. The case must be declined, as well, if the at-risk partner is not endorsing the process and if s/he has any safety concerns.

²⁰¹ *Spouse/Partner Abuse Information, What About the Victim?*, NAT'L COUNCIL ON CHILD ABUSE & FAM. VIOLENCE, <http://www.nccafv.org/spouse.htm> (last visited Aug. 23, 2015).

²⁰² *Domestic Violence—Discussion Questions*, NO SAFE PLACE: VIOLENCE AGAINST WOMEN, PUBLIC BROADCASTING SERVICE (PBS), <http://www.pbs.org/kued/nosafeplace/studyg/domestic.html> (last visited Jan. 5, 2017).

²⁰³ See generally Goldman & Pollock, *supra* note 170.

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Because those who cause harm in families are often charming, witty, and engaged individuals,²⁰⁴ the practitioner cannot assume that any good behavior displayed in the lawyer's office is the same behavior employed with the intimate partner or children. Yet publicly appropriate behavior might indicate that the client prefers settlement to public disclosure of coercive behavior.²⁰⁵ Should the at-risk partner believe that the collaborative process is her safest option, then having an abusive partner caring most about suppression of the parties' history might assist in keeping negotiations civil and more balanced. Negotiations will be more reasonable when the party who caused harm has something to protect, such as his reputation or employment.²⁰⁶

As in interviews with the at-risk partner, counsel interviewing the abusive partner must ask specific questions designed to uncover any abuse history.²⁰⁷ For the abusive partner, the following are a sample of appropriate inquiries: Did you ever hit, slap, shove, or punch your partner? Have you ever destroyed any of your partner's property? Have you ever used disrespectful language in addressing your partner? Have you ever followed your partner or tracked your partner's activities? Most abusers will minimize their coercive actions. The abusive partner typically will either claim that the coercive behavior never happened or that it happened only once.²⁰⁸ The abusive partner will also describe themselves as the victim.²⁰⁹ Counsel for the party who caused harm

²⁰⁴ Lisa Marie De Sanctis, *Bridging the Gap Between the Rules of Evidence and Justice for Victims of Domestic Violence*, 8 YALE J.L. & FEMINISM 359, 372 (1996).

²⁰⁵ J. Cross Creason, *Eliminating the Use of Civil Compromise in Cases of Domestic Violence, Elder Abuse, and Child Abuse*, 29 MCGEORGE L. REV. 641, 647 (1998) ("Opponents of civil compromise in domestic violence cases argue that abusers may take advantage of the reconciliation pattern that follows a battering incident. For example, victims of domestic violence often regret their decision to participate in civil compromise because the cycle of abuse frequently continues—despite assurances from the batterer. Opponents of civil compromise also believe that civil compromise sends the message to abusers and their victims that society does not take abuse among people living together seriously when it allows the abuser to escape without serious outside intervention.").

²⁰⁶ Drew, *supra* note 91, at 50 (2012).

²⁰⁷ See generally Burman, *supra* note 94.

²⁰⁸ See NAT'L COUNCIL OF JUVENILE AND FAMILY COURT JUDGES, A JUDICIAL GUIDE TO CHILD SAFETY IN CUSTODY CASES card 2 (2008), http://www.ncjfcj.org/sites/default/files/judicial%20guide_0_0.pdf ("Abusers often will use only as much coercion as is necessary to maintain control over the other parent or the child.").

²⁰⁹ Steven Stosny, *The Line Between Victims and Abusers*, PSYCHOLOGY TODAY (May 15, 2009), <https://www.psychologytoday.com/blog/anger-in-the-age-entitlement/200905/the-line-between-victims-and-abusers>. See also Jeff Landers, *How Some Men Are Upending Domestic Violence Laws to Scam an Advantage in Divorce*, FORBES (May 22, 2012, 10:23 AM),

and the other team members will best preserve the integrity of the collaborative process if they are on the alert for manipulation of the process, the team, and the at-risk partner.

Team de-briefings held after each session should include an analysis of the coercive partner's behavior for signs of manipulative tactics.²¹⁰ If the team has confronted manipulation or coercion, the team can assess the consequences. Confronting the abusive party can be done respectfully and firmly, with only the intention to stop the behavior, not to embarrass the clients. Taking the abusive party aside for discussion outside the hearing of other participants may accomplish the desired objectives. When in doubt, consider how best to confront the abusive partner in a clear manner, but the one least likely to trigger more coercive behavior. As always, best practice will include a consultation with the at-risk partner who will have suggestions that protect her safety.²¹¹ Engaging a specialist in treating those who abuse is advised as well.²¹²

An analysis of the at-risk partner's behavior could uncover unrecognized coercive behavior that causes her increasing discomfort. At-risk partner behavior that undermines the agreed upon process, such as talking loudly or rejection of seemingly innocuous terms, may be the at-risk partner's counter-intuitive response to a perceived threat. The at-risk partner's behavior may have its origins in prior traumatic responses or use of tactics that successfully forestalled physical abuse in the past. The at-risk partner may also reflect a belief that the collaborative team is not protecting her. The at-risk partner who feels unprotected may resort to direct negotiations with the abusive partner as a way to try to gain some control over the process.²¹³

<http://www.forbes.com/sites/jefflanders/2012/05/22/how-some-men-are-upending-domestic-violence-laws-to-scam-an-advantage-in-divorce/#3dcc644328b6>.

²¹⁰ See Drew, *supra* note 91, at 50 (2012) ("An important part of the collaborative process is the use of frequent face-to-face meetings, often called 'four-way' meetings. This contact with the coercive partner can be traumatizing for targets, particularly during the early stages of separation and recovery.").

²¹¹ See *id.* at 35 ("Targets make what they believe to be reasonable choices in their circumstances. These choices can be appreciated only when safety is understood as the primary decisionmaking influence.").

²¹² See generally Elizabeth Bernstein, *Domestic Abusers Can Reform, Studies Show*, THE WALL STREET JOURNAL (Sept. 15, 2014) <https://www.wsj.com/articles/domestic-abusers-can-reform-studies-show-1410822557>.

²¹³ Drew, *supra* note 91, at 51 ("Similarly, threats can be delivered in ways not understood other than by the target. A settlement offer where the coercive partner insists on taking the family dog could be a threat known only to the partner. The coercive partner might have abused the family dog. Delivering this demand in a face-to-face meeting could have a powerful effect on the at-risk partner.").

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To maintain the integrity of the negotiations as well as the commitment to create the safest space possible, the team must regularly assess what happens in each of the sessions through the lens of safety.

PART IV. ALTERING THE PROCESS TO PRIORITIZE THE NEEDS OF THE AT-RISK PARTNER

When the collaborative team accepts a case of coercion, the team must make adjustments to the process' structure as well as to their own behavior. The suggestions below are intended to act as a primer of factors to be considered before and during the collaborative process involving cases of abuse and coercion. Some recommendations expand on suggestions addressed above. As a whole, the recommendations form a checklist of the most important, but not exclusive, factors to be considered.

A. *Assessing Whether Coercive Behavior is Present in the Relationship*

Careful probing of why a client wants to engage in the collaborative process might help uncover coercive behavior.²¹⁴ For example, if a client has financial means, but the partner has limited or no access to resources, the lawyer needs to assess if the collaborative process serves as an extension of the abusive client's ability to demand participation in a process the client believes he can control.²¹⁵ In addition, the abusive client might be willing to release funds for the partner's counsel only if he controls the selection of counsel.²¹⁶ Counsel for the abusive partner has an obligation at this juncture to make clear to the client that any attempt to control the partner's choice is unacceptable in a process designed to eliminate conflict. Once the client's goal

²¹⁴ See Ver Steegh, *supra* note 27, at 719 ("A victim may be more likely to disclose coercive-controlling violence after establishing a trusted relationship with an open and empathetic listener.").

²¹⁵ MICHELE WELDON, *I CLOSED MY EYES: REVELATIONS OF A BATTERED WOMAN* 138 (1999).

²¹⁶ Leah J. Pollema, *Beyond the Bounds of Zealous Advocacy: The Prevalence of Abusive Litigation in Family Law and the Need for Tort Remedies*, 75 UMKC L. REV. 1107, 1110 (2007) (Noting the tendency of abusive partners to lord the legal process over their victim's head in order to perpetuate control: "A perpetrator of domestic violence may use the legal system as a tool to maintain power and control over his former spouse or partner. Though domestic abuse victims go to great lengths to avoid or reduce contact with their abusers and former spouses, the abusers may use the legal system to mainn and even prolong that contact.").

(control) is uncovered, the attorney may be ethically obligated to decline further representation.²¹⁷

B. *Confronting the Coercive Behavior*

Reinforcing prior suggestions, the collaborative team must develop clear guidelines that have zero tolerance for coercion including gender-based derogatory and demeaning language. The entire team, and particularly counsel for the coercive partner, must be willing to confront the controlling and coercive behavior and should decide in advance how that confrontation will happen. Failure to draw boundaries early in the professional relationship will empower the coercive partner, who will attempt to co-opt counsel into the client's manipulations.²¹⁸

As mentioned earlier, confronting the abusive behavior must be done in a way that considers the at-risk partner's safety. Whether inappropriate behavior is addressed privately or in the presence of the other party and the team members will depend upon the circumstances. Advance planning with the at-risk client will guide the team members in determining the safest and most effective approach to addressing problematic behavior.

C. *Modifying the Contract*

The contracts between clients and collaborative lawyers and other professionals are the documents that not only set out the terms of engagement, but also direct how the process will be accomplished. When a case involves abuse, several alterations to the contract are required. Some of these instances are addressed below and others have been discussed more extensively above. The brief, non-exclusive list is summarized:

1. **Prioritizing Safety.** Without a written agreement that prioritizes safety, the coercive control case should not proceed through the collaborative process. The commitment to prioritize safety is best memorialized among all of the professionals and clients. Moreover, if the at-risk partner determines that memorializing the safety priority in writing between the lawyers and the parties is itself a safety risk,

²¹⁷ *Id.* at 1113 (Noting that “when emotions take over, even attorneys begin to lose sight of their professional and ethical responsibilities.”). See MODEL RULES OF PROF’L CONDUCT r. 3.4 (AM. BAR ASS’N 2017).

²¹⁸ Dutton et al., *supra* note 54, at 485 (noting that counsel for batterers are in the best position to end abuse of legal processes by persuading clients to end unlawful abusive behavior and seek help).

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the professionals can write a separate agreement among themselves confirming their commitment to prioritize safety. One team member should be charged with reminding the team of their safety commitment when difficulties arise during negotiations or otherwise. Reframing concerns through the lens of safety brings a different perspective to understanding the dynamics at play during negotiations.

2. **Remote Conferencing.** The use of remote conferencing is a term to be included in the initial or any amended contract. The at-risk client and counsel must determine whether to include other options for meetings. If only remote meetings are referenced in the contract, the likelihood of the abusive partner to press for in-person meetings may be reduced. The contract may later be amended should the at-risk partner request in-person meetings. The ability to make this amendment should not be included among the original terms of the contract or the abusive partner could spend the negotiation time attempting to force in-person meetings.
3. **Attorney's Fees.** As discussed in more detail earlier, in establishing an attorney's fees escrow account for the at-risk partner, the attorneys must draft in clear and precise terms the purpose of the escrow and the terms under which the funds will be released. The escrow provision will fail if the terms do not prevent interference by the abusive partner when time comes to release the account to the at-risk client.
4. **Limiting Access to Non-Essential Information.** Before communications begin, the collaborative team can agree that a request for information that could place the at-risk partner in more danger is inappropriate.²¹⁹ Typically, the abuser's request for such information is a pretext for seeking information about the partner's new or prior relationships.²²⁰ Requests can extend to other information, such as location of the at-risk partner's employment or

²¹⁹ See Joan Zorza, *Recognizing and Protecting the Privacy and Confidentiality Needs of Battered Women*, 29 FAM. L.Q. 273, 280–94 (1995) (describing the various types of information that should be kept from the abusive partner).

²²⁰ Jeffery R. Baker, *Necessary Third Parties: Multidisciplinary Collaboration and Inadequate Professional Privileges in Domestic Violence Practices*, 21 COLUM. J. GENDER & L. 283, 302 (2011).

new residence.²²¹ Likewise, information obtained could be utilized for the sole purpose of shaming the at-risk partner during negotiations as he would in court: "If he can pry into his victim's revelations to her counselors and attorneys and disclose them in open court, he could continue his abuse by shaming and discrediting her, as well as anything else he might do in order to ensure an acquittal."²²² The collaborative agreement must assure restrictions on the abusive party's access to information that the team agrees is inappropriate or the at-risk client believes jeopardizes safety. This restriction on full and open disclosure may be anathema to collaborative professionals who prioritize good faith disclosure. But requests for information must be made in good faith, as well. The decision on whether to produce requested information belongs to the at-risk client. If that decision is at odds with any member of the team, or if team members disagree among themselves, then the at-risk client and counsel should consider terminating the process. Best practice is to alter the initial participation agreement to limit access to information that might escalate abuse. Sometimes, however, the existence of coercive control is discovered after the collaborative process has begun. Either the participation agreement can be amended at that point or all members of the team can agree that the requested information is unnecessary and so inform the coercive party.

The at-risk party's work and home address, contact information of friends and family, and other personal information that will assist the abusive partner in locating the at-risk partner and harassing her support system is not necessary for settlement. Wage information can be provided without disclosing the location of the at-risk partner's workplace. The domestic abuse expert can bring an additional safety analysis to the discussion. Transparency is subordinate to safety. Usually, information that must be restricted for safety reasons is not essential for settlement.²²³ To the extent possible, the contract should make clear that requests for information will be considered in the light of how essential the information is to achieving agreement.

²²¹ See Zorza, *supra* note 219, at 283.

²²² Baker, *supra* note 220, at 302.

²²³ See Drew, *supra* note 5, at 50 ("For example, whether the target is in a new relationship is often irrelevant to settlement discussions. Obtaining this information can be a focus of coercive partners who use many tools, including litigation and settlement processes, to discover the whereabouts and activities of their partners."). See, e.g., Anita Vestal, *Domestic Violence and Mediation: Concerns and Recommendations*, MEDIATE.COM (May 2007), <http://www.mediate.com/articles/vestalA3.cfm>.

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Counsel and the at-risk client can determine what other terms are to be added or removed from the agreement. If necessary, the agreement can include such detail as the timing of the at-risk party's arrival at conferences or for the final court hearing only. Typically, the at-risk partner's arrival happens only after being informed that her partner has entered the location. Exit protocols can be similarly prescribed with the abusive partner remaining at any location until the at-risk partner has had sufficient time to safely leave the area. Other protocols can be in place to protect the at-risk partner.²²⁴

D. *Hiring the Domestic Abuse Expert*

Some of the benefits of hiring an abuse expert have been discussed. Collaborative teams are accustomed to the participation of a variety of experts. Family law attorneys, therapists, child custody experts, financial consultants, and coaches all participate in assisting the parties in reaching resolution.²²⁵ When coercion is a factor, the team would be wise to include a domestic abuse expert. The abuse expert can be a regular screener of cases that may be referred to the collaborative process.²²⁶ While early screening out of abuse cases is preferred, the abuse expert could advise the team as awareness of coercive dynamics surfaces during the process and advise on safety planning. Experienced domestic abuse attorneys, therapists, shelter advocates, rape crisis center counselors, as well as directors of batterers' education programs are examples of experts who are available in most communities to consult on abuse cases and work with the at-risk client developing safety plans. There are also on-line resources to assist in the development of the plan.²²⁷

Frequent check-ins with a domestic abuse expert must be part of the collaborative process if one is not a full member of the original team. Terms of an agreement may create significant safety risks not apparent to other members of the team. Safety provisions can be structured within and outside of the agreement. The domestic violence expert will provide useful guidance for the team.

²²⁴ See, e.g., Vestal, *supra* note 223.

²²⁵ See Tesler, *supra* note 140, at 331.

²²⁶ See Quirion, *supra* note 172, at 12, 13, 26.

²²⁷ See, e.g., *Personalized Safety Plan*, DOMESTICVIOLENCE.ORG (2015), <http://www.domesticviolence.org/personalized-safety-plan/>.

E. *Terminating the Process*

Terminating the process is an unwelcome last resort for most collaborative professionals.²²⁸ Terminating the process is often unwelcomed by the team members as termination can be misinterpreted as failure and also causes increased client expense in hiring new counsel. But collaborative professionals must be willing to terminate the process when attempts to exert control over the abusive partner have failed.²²⁹ Strict behavioral guidelines must be in place and there must be swift consequences for non-compliance. The likelihood of reaching an equitable agreement diminishes when coercive behavior is tolerated without consequences.²³⁰

An obstacle to termination of the collaborative process could arise if the at-risk client believes that she will be in greater danger if the process terminates. Yet, continuation risks undermining collaborative principles if good faith negotiations cannot be assured. However, to terminate without the abuser's consent could make the at-risk client less safe.²³¹ Domestic violence lawyers confront these risks in most cases. Since domestic violence experts are safety driven, the risks attendant to termination of the process should be discussed with the at-risk client and the expert prior to commencement of the termination process.²³² Necessary safety measures need to be in place for the protection of the at-risk partner before the abusive partner learns that the process is ending.

²²⁸ See Lande & Mosten, *supra* note 144, at 387.

²²⁹ See Gary L. Voegele et al., *Collaborative Law: A Useful Tool for the Family Law Practitioner to Promote Better Outcomes*, 33 WM. MITCHELL L. REV. 970, 980 (2007) (discussing the purpose of the disqualification agreement).

²³⁰ Hughes, *supra* note 123, at 578 ("On the other hand, the more equal the relative power, the more likely parties will cooperate in arriving at more equitable agreements. The axiom that unequal power results in inequitable agreements has as its progenitor negotiation and historical forms of mediation. From the theory of negotiation, relative equality of power and resources between parties will result in approximately equal division of resources, whereas parties with greater power will demand and ultimately receive a larger share of resources.").

²³¹ *Uniform Collaborative Law Act*, 38 HOFSTRA L. REV. 421, 460 ("A victim of a coercive and violent relationship could be additionally harmed if her lawyer is disqualified from further representation if collaborative law terminates.").

²³² See Lande & Mosten, *supra* note 144, at 411.

F. *Reflecting on Struggle*

In relationships that do not involve abuse, the partners' emotional distress often begins to dissipate within several months following separation.²³³ While recovery from separation and divorce can take years, when abuse is not present, couples can often participate in reasonable settlement discussions a few months after the process begins.²³⁴ Particularly where the parties have children, they often are able to agree on what is in the best interest of the children. This common interest can assist the parties in relaxing in their positions, focus on common goals and be less blaming and more flexible.²³⁵

The struggle in a coercive relationship, however, does not end easily and can last for years beyond physical separation.²³⁶ The inability to reach consensus on terms of final settlement, particularly after the team believes settlement has been reached, should trigger the discussion on whether to terminate the process. Victim blaming is a common characteristic in the domestic violence response, and that tendency is not exempt from the collaborative process.²³⁷ This perspective carries with it implicit victim-blaming and deprives the at-risk client of her autonomy as well as access to a fair agreement.

Coercive negotiations include undermining tactics, some of which are described above. When the at-risk partner relaxes, thinking that reasonableness has prevailed, the abusive partner demands renegotiation. Either the abusive partner will raise new issues, or look to undermine either

²³³ See Kenneth Kressel, *Patterns of Coping in Divorce and Some Implications for Clinical Practice*, 29 FAM. REL. 234, 235-37 (1980) (describing the stages of an individual's coping with divorce). See generally Chris Wemple, *Surviving Divorce: An Overview of Stages in the Process*, 18 PREVENTIVE L. REP. 18 (1999-2000).

²³⁴ Kressel, *supra* note 233, at 236 (noting that parties can take years to recover from a separation, even when there is no abuse).

²³⁵ See Tesler, *supra* note 140, at 328 (stating that the collaborative process promotes finding common goals and not using blaming language).

²³⁶ Katherine M. Reihing, *Protecting Victims of Domestic Violence and Their Children After Divorce: The American Law Institute's Model*, 37 FAM. & CONCILIATION CTS. REV. 393, 394 (1999) (noting that violence escalates when the batterer learns that his victim is about to leave or, in fact, does leave and the abusive party's insistence that he has a superior position, his stepping back from settlement when the parties are close, and the insistence that "one more" issue be addressed or renegotiated can mar the collaborative process).

²³⁷ See generally, *Charging Battered Mothers with "Failure to Protect": Still Blaming the Victim*, 27 FORDHAM URB. L.J. 849 (1999).

the entire agreement or those terms important to the at-risk partner.²³⁸ The collaborative team might believe that resolving, “one more issue” will attain settlement and appease the complaining party. Unless the at-risk partner’s concession has been part of the negotiation strategy, now is the time to protect the agreement. Concession will weaken the at-risk partner’s position in future interactions with the partner. The team’s insistence upon additional concessions to “save” the agreement can result in undue pressure on the at-risk client as he or she is often the more reasonable (or less powerful) partner and more likely to give into the demands in order to end the negotiations.²³⁹ At this point, the at-risk client recognizes that once again the abusive partner’s appearance of reasonableness was a sham. The team typically resists risking negotiations falling apart. The team’s tactics in pressuring concession can feel coercive to the abused partner. This is precisely the time when the team must consider ending the process, a difficult decision, but a necessary one.

This response is common in other processes, including private and court sponsored negotiations.²⁴⁰ In addition, “[a] battle weary spouse might focus too little on important matters and, in an attempt just to be done with the divorce, concede too much to the other side.”²⁴¹ But in collaborative law, the at-risk party’s expectation is to reach reasonable resolution. When that does not happen, the at-risk partner may relinquish due to emotional exhaustion.²⁴² On the other hand, he or she may be concerned about her financial ability to proceed if no escrow has been established for her benefit so that litigation counsel can be hired.

As indicated earlier, sometimes the at-risk partners will resist further concessions and this can bring the team’s focus on her as she is blamed for settlement failure. Intuitively, the team understands that settlement is unlikely to happen unless the at-risk partner adopts the abusive partner’s position. This is exactly the point at which the team needs to step back and re-examine their intention. If the commitment was made early in the process to prioritize the at-risk partner’s safety, then focusing on the at-risk partner in order to reach settlement at any cost is a breach of that commitment. Wavering from this

²³⁸ See Robert F. Cochran, Jr., *Legal Ethics and Collaborative Practice Ethics*, COLLABORATIVE L. 16, 24 (discussing the obligation of collaborative lawyers to advise domestic violence survivors of the risks of entering the collaborative process).

²³⁹ See Hughes, *supra* note 123, at 578 (“As a result, failure to deal with power imbalances disadvantages the less powerful party.”). See also, Hughes, *supra* note 123, at 571 (“Finally, one may fear conflict so greatly that she accepts the agreement in order to end the conflict at all costs.”).

²⁴⁰ See Hughes, *supra* note 123, at 578.

²⁴¹ Salava, *supra* note 39, at 182.

²⁴² See generally Drew, *supra* note 5.

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position exposes that reaching settlement, not safety, has become the priority. Expecting the at-risk partner to subordinate her interests so that settlement may be accomplished can be a form of coercion.²⁴³ The fear of returning to a litigation practice can undermine the integrity of the lawyers' advocacy, which evidences in pressuring clients to settle. In addition, "[s]ome fear that collaborative divorce attorneys, if focusing too much on settlement and too little on obtaining clients' maximum individual benefit, might not adequately fulfill their professional requirement to be 'zealous' advocates for their clients."²⁴⁴ This creates a dilemma for the practitioner, who may not even be aware of her wavering ethics.

Pausing settlement discussion to consider the motives of the practitioners will help clarify much of the frustration that accompanies lack of settlement. The practitioner may have an unacknowledged conflict of interest. Conflicts can come in many forms.²⁴⁵ Finances are not the only consideration. Collaborative lawyers can become invested in the success of the process over the best interest of their clients. In every case, but particularly in the intimate abuse case, lack of detachment with the outcome of the process harms the clients. Periodic re-evaluation of motives and intention works best if built into the process. Stalled negotiations provide an opportunity for the team members to be reminded of their initial commitments to prioritize safety and respect autonomy.

In a process that emphasizes respectful language, collaborative practitioners often refer to the lack of reaching an agreement as a "failure."²⁴⁶ The language is not only emotionally-charged, but is easily taken personally by the team members. More likely, the process was simply not the appropriate one from the beginning and the "failure" is a great opportunity for the team to learn better screening techniques.

G. *Shifting Perspective on "Failure"*

Once the practitioner has moved beyond the "failure" concept, he or she should understand that the tactic of demanding "one more thing" when all other members thought agreement had been reached, is a manipulation. Rather than focus on the inability to reach settlement that was "this close," the collaborative team might consider to what extent the manipulative partner

²⁴³ *Coercion*, BLACK'S LAW DICTIONARY (10th ed. 2014) ("compulsion of a free agent by physical, moral, or economic force or threat of physical force").

²⁴⁴ Salava, *supra* note 39, at 190.

²⁴⁵ MODEL RULES OF PROF'L CONDUCT r. 1.7 (AM. BAR ASS'N 2017).

²⁴⁶ See generally Jack G. Marcil & Nicholas D. Thornton, *Avoiding Pitfalls: Common Reasons for Mediation Failure and Solutions for Success*, 84 N.D. L. Rev. 861 (2008)

controlled the negotiations through seeming compliance, only to prevent final agreement because of new demands. Settlement at this juncture may not be in the best interests of the at-risk partner and may be unrealistic as the party who causes harm may have no intention of reaching final settlement. If the team has committed to confronting coercive behavior, then ending the manipulation by terminating the process is an appropriate decision.²⁴⁷ If an escrow has been established for the benefit of the at-risk partner, the time to release those funds has arrived.

The un-persuaded practitioner who believes that the process should continue might keep in mind that refusal to terminate the process when the coercive partner does not negotiate in good faith supports the continuation of that behavior and defeats collaborative principals. If unchecked, the abuser's control is enhanced. While the team may be satisfied because resolution is reached, uneducated team members might not realize how severely the process has diminished the at-risk client's sense of safety and how unbalanced the agreement might be.²⁴⁸

Often the determination to make the process "succeed" is driven by the collaborative lawyers well beyond indications that the process should be terminated. While family law lawyers are prepared to deal with client emotions, they often do not recognize their own.²⁴⁹

A shift in perspective recognizing that not all negotiations do, or should, result in agreement is not "failure." It is simply one possible result of a case.

H. *Team Reflections*

As noted, the team members may focus on the at-risk partner's behavior as the obstacle to a successful collaborative result.²⁵⁰ Rather than examining factors outside of the team, such as the behavior of the clients, a more helpful reflection is to uncover the source of the breakdown by looking inward at the collaborative team itself.²⁵¹ A detached analysis of the client dynamics might

²⁴⁷ See, e.g., 5A OHIO JUR. 3D *Alternative Dispute Resolution* § 166 ("The mediator may terminate mediation if he or she believes there is a continued threat of domestic violence or coercion between the parties.").

²⁴⁸ See generally Hughes, *supra* note 123.

²⁴⁹ See generally Zorza, *supra* note 219.

²⁵⁰ See Thompson, *supra* note 38, at 618.

²⁵¹ This ability to self-reflect is a goal of law school experiential programs. Any lawyer who has taken a law school clinic will be familiar with the process. For example, see Beryl Blaustone, *Teaching Law Students to Self-Critique and to develop Critical Clinical Self-Awareness in Performance*, 13 CLINICAL L. REV. 143 (2006). See also Hughes, *supra* note 123, at 565 (mediability should be determined through an ongoing analysis of the relative

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uncover a power imbalance that was not appreciated earlier. What originally may have seemed immature or uncooperative behavior on the part of either client, might actually have been a demonstration of the power dynamic. Most importantly, as suggested earlier, the team must analyze what was missed in their original client screening that led to the couple's acceptance into the collaborative process. Likely, reflection will unveil that no one individual team member failed to see the coercive signs. All, or a majority of, team members may have missed the dynamics present in the coercive relationship. For example, the at-risk partner's behavior might have been considered disruptive to the collaborative process when in fact the behavior was responsive to undetected control exerted by the abusive partner. Once team focus shifts to the behavior of the at-risk partner, the coercive partner will appear cooperative, calm, and reasonable by contrast.²⁵²

Once team members have reflected together and individually, the team can engage in a discussion of whether the case is or ever was appropriate for the collaborative process. The reflection process will help the team become more sensitive to controlling dynamics. Enhanced recognition will serve the team members in future assessments. Team members can use this opportunity to examine what they would do differently and what they did well to protect the at-risk client.

Why team members failed to identify coercive dynamics at an earlier juncture takes more courageous exploration. Team members may be forced to confront their own experiences as well as their own attitudes toward men and women as well as their gender expectations. Finally, team members should explore how much their over-zealous commitment to the collaborative process or their financial need contributed to extending the process beyond the point at which beneficial negotiations were possible.

PART V. CONCLUSION

Collaborative lawyers have an opportunity to lead the family law bar in demanding that their members develop expertise in understanding the dynamics of coercive control. Before engaging clients who have experienced abuse in the collaborative law process, the practitioners and other team members must commit to prioritizing safety. If each member of the team is not fully committed to safety, then the abuse case must be rejected from the

levels of power between the parties and, contrary to the approach of many rules or guidelines, cannot easily be determined by looking at any single factor, such as abuse).

²⁵² See generally Joan Zorza, *What is Wrong with Mediation*, 9 DOMESTIC VIOLENCE REP. 81, 94 (2004) (describing the various ways in which the coercive partner manipulates the mediation process).

collaborative process. Only the collaborative team members will know the sincerity of their commitment to safety and to learning the dynamics of coercive relationships. Without the intention to prioritize the safety needs of the at-risk partner and to preserving her autonomy during the collaborative process, the client who experienced abuse will be disserved and may exit the process in greater danger than when she or he entered.